110-32

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 175.

ISAAC N. JENNESS, PLAINTIFF IN ERROR,

vs.

THE CITIZENS' NATIONAL BANK OF ROMEO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 23, 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 175.

ISAAC N. JENNESS, PLAINTIFF IN ERROR,

vs.

THE CITIZENS' NATIONAL BANK OF ROMEO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and proof of service	5	1
Declaration	7	2
Notice of bill of particulars	9	3
Rule to plead	12	4
Affidavit for amendment of declaration	13	5
Order amending declaration	14	6
Proof of service of narrator, &c	15	6
Plea and affidavit	16	7
Default of defendant Fish	18	8
Default absolute of defendant Fish, and judgment interlocutory	19	8
Stipulation to amend declaration	20	8
Amendment to declaration	22	10
Venire	24	11
Verdict	24	11
Order giving defendant twenty days to move for new trial	25	11
Motion for new trial	25	11
Motion for new trial denied	27	12
Judgment	27	12
Notice to defendant Fish to join in writ of error and affidavit	31	13
Bill of exceptions	33	14
Promissory notes	33	14
Testimony of John Smith, jr	33	14
S. A. Reed	37	17
Allen Fish	38	18
I. N. Jenness	42	20
Charge	43½	21
Exceptions	46	23
Assignment of errors	48	24
Clerk's certificate	51	26

1 *Writ of error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you between the Citizens' National Bank of Romeo, plaintiff, and Isaac N. Jenness and Allen Fish, defendants, a manifest error hath happened to the great damage of the said defendant, Isaac N. Jenness, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington
2, 3 on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of July, in the year of our Lord, one thousand eight hundred and eighty.

ADDISON MANDELL,
Clerk of the Circuit Court of the United States,
for the Eastern District of Michigan.

Allowed as to defendant, Isaac N. Jenness.

H. B. BROWN.

4 (Indorsed:) Isaac N. Jenness and Allen Fish, pl'ffs in error, v. The Citizens' National Bank of Romeo, def't in error. Writ of error. Filed July 27, 1880, A. Mandell, c'k.

5 The United States of America to the Citizens' National Bank of Romeo, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein Isaac N. Jenness, impleaded with Allen Fish, *is* plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan, this 27th day of July, A. D. 1880.

HENRY B. BROWN,
District Judge.

6 UNITED STATES OF AMERICA.
State and Eastern District of Michigan, ss:

On this seventh day of August, A. D. 1880, personally appeared before me the subscriber, Henry A. Harmon, and made oath that he delivered a a true copy of the within citation to George V. N. Lothrop, esq., the attorney of record of the within-named Citizens' National Bank of Romeo, by handing the same to him personally, at his office in the city of Detroit, on said 7th day of August.

HENRY A. HARMON.

Subscribed and sworn to this 7th day of August, A. D. 1880, before me.
ADDISON MANDELL,
Comm'r Circuit Court U. S., E. D. of Mich.

(Indorsed:) Isaac N. Jenness, plaintiffs in error vs. The Citizens' National Bank of Romeo. Def't in error. Citation. Filed Aug. 7, 1880. A. Mandell, c'k.

7 Pleas before the judges of the circuit court of the United States for the sixth circuit and eastern district of Michigan, at the district court-room, in the city of Detroit, of the term of June, in the year of our Lord one thousand eight hundred and seventy-eight.

IN THE CASE WHEREIN THE CITIZENS' NATIONAL Bank of Romeo is plaintiff
and
ISAAC N. JENNESS & ALLEN FISH ARE DEFENDants.

Be it remembered that on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and seventy-eight, the said plaintiff, by George V. N. Lothrop, its attorney, came into the court aforesaid before the judges thereof, and filed its declaration against the said defendants, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

In the circuit court of the United States for the eastern district of Michigan.

8 The Citizens' National Bank of Romeo, Michigan, a body corporate and politic incorporated under and by virtue of the provisions of the acts of Congress of the United States for the incorporation of national banks, and doing business as a national bank at Romeo, in the eastern district of Michigan, plaintiff herein, by George V. N. Lothrop, its attorney, comes and complains of Isaac N. Jenness and Allen Fish, who are both citizens of the State of Michigan, residing in said district, partners, under the name and style of I. N. Jenness & Co., defendants herein, in a plea of trespass in the case upon promises, filing this declaration and entering rule to plead as commencement of suit.

For that whereas heretofore, to wit, on the first day of March, A. D. 1878, at the district aforesaid, the defendants were indebted to the plaintiff in the sum of twenty thousand dollars, for money then and there lent by the plaintiff to the defendants at their request.

And in the sum of twenty thousand dollars for money then and there paid by the plaintiff for the use of the defendants at their request.

And in the sum of twenty thousand dollars for money then and there received by the defendants for the use of the plaintiff.

9 And in the sum of twenty thousand dollars for money found to be due from the defendants to the plaintiff on an account then and there stated between them.

And whereas the defendants afterwards, to wit, on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay it the said several sums of money respectively on request, yet the defendants have disregarded their said promises, and have not, though often requested so to do, paid any of the said sums of money, or any part thereof, to plaintiff, twenty thousand dollars, & plaintiff therefore brings suit, &c.

(Sig'd) GEO. V. N. LOTHROP,
Attorney for Plaintiff.

Notice of bill of particulars.

To the within-named defendants:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence certain promissory notes, copies of which are given below, and which notes constitute plaintiff's sole bill of particulars in this action.

(Sig'd) GEO. V. N. LOTHROP,
Plaintiff's Attorney.

$2,000.00.] ATTICA, LAPEER CO., MICH., *Nov.* 25, 1876.

Ninety days after date we promise to pay to the order of I. N. Jenness two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness.

10 $2,000.00.] PORT HURON, *May* 29, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *Sept.* 1, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *May* 21, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *Aug.* 24, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

11 $2,000.00.] PORT HURON, *March* 10, 1877.

Sixty days after date we promise to pay to the order of I. N. Jenness two thousand dollars, at the American National Bank, Detroit. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness, Thos. S. Skinner.

$400.00.] ATTICA, LAPEER CO., MICH., *Dec.* 21, 1877.

Two months after date we promise to pay to the order of A. & H. Fish four hundred dollars, at Citizens' National Bank, Romeo, Mich. Value received.

(Sig'd) I. N. JENNESS & CO.

(Endorsed:) A. & H. Fish.

$2,000.00.] PORT HURON, *Feb'y* 26, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

To the within-named defendants:

Take notice that on filing a declaration in this cause (of which the within is a true copy), as commencement of suit, a rule was entered in a book rules kept by the clerk of said court, in his office in the
12 city of Detroit, in said district, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule or judgment, &c.

Yours, &c.,

GEO. V. N. LOTHROP,
Plaintiff's Attorney.

(Endorsed on declaration:)

I acknowledge myself liable for all costs for which plaintiffs may be liable in this cause.

Sept. 25, 1878.

(Sig'd) GEO. V. N. LOTHROP.

Upon the filing of which said declaration the following rule was entered in the common rule-book of said court:

Rule to plead.

THE CITIZENS' NATIONAL BANK OF ROMEO, Michigan,
vs.
ISAAC N. JENNESS AND ALLEN FISH, PARTNERS, under the name of I. N. Jenness & Co.

SEPT. 25, 1878.

On filing declaration in this cause as commencement of suit and on motion of George V. N. Lothrop, attorney for plaintiff, it is ordered that the above-named defendants appear and plead to said declaration within twenty days after service on them of a copy of said declaration, together with a notice of this rule or judgment, &c.

(Sig'd) GEO. V. N. LOTHROP,
Att'y for Plaintiff.

13 Afterwards, to wit, on the thirtieth day of September, A. D. 1878, said plaintiff came & filed a copy of said declaration and notice, with acceptance of service endorsed thereon in the words and figures following, viz:

Acceptance of service of Narr.

Service accepted.

September 28, 1878.

(Sig'd) ALLEN FISH.

Afterwards, to wit, on the 30th day of September, A. D. 1878, said plaintiff came and filed in said court an affidavit in the words and figures following, to wit:

Affidavit for amendment of declaration.

UNITED STATES OF AMERICA:
Eastern District of Michigan, ss:

In the circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO, Michigan,
vs.
ISAAC N. JENNESS & HENRY FISH.

George V. N. Lothrop, of the city of Detroit, being duly sworn, deposes

and says that he is the attorney for the plaintiff in the above-entitled cause and drew the declaration in this case; that by mistake the deponent used the name of Henry Fish in designating one of the defendants instead of Allen Fish, the true name of the party intended to be made defend-
14 ant; that deponent knows Mr. Allen Fish, but never knew Mr. Henry Fish, who has been dead for some time; that no one has yet appeared in this case.

(Sig'd) GEO. V. N. LOTHROP.

Sworn to & subscribed before me this 30' day of September, A. D. 1878.

(Sig'd) CHARLES B. LOTHROP,
Notary Public, Wayne Co., Mich.

And thereupon, upon motion of said plaintiff by its said attorney, an order was entered in said court in said cause, on said thirtieth day of said September, A. D. 1878, in the words following, to wit:

Order amending declaration.

THE CITIZENS' NATIONAL BANK OF ROMEO }
vs.
ISAAC N. JENNESS AND HENRY FISH. }

Upon filing the affidavit of George V. N. Lothrop, attorney for plaintiff, showing that Allen Fish and not Henry Fish was the party defendant really intended, and that the name "Henry" was used by mistake for "Allen," it is ordered that the plaintiff be allowed to amend the declaration on file in this case, and the rule to plead entered therein by amending the name "Henry Fish" wherever it occurs in said declaration and rule, so that it shall read "Allen Fish."

15 Afterwards, to wit, on the 4th day of October, A. D. 1878, said plaintiff came into court and filed proof of service of a copy of said declaration upon defendant Isaac N. Jenness, which proof of service was endorsed upon a copy of the original declaration filed in said cause, and is in the words & figures following, to wit:

Proof of service of declaration on def't Isaac N. Jenness.

UNITED STATES OF AMERICA,
Eastern District of Mich., ss:

I hereby certify and return that on the 27th day of September, 1878, I served the declaration, of which the within is a true copy, on Isaac N. Jenness, one of the defendants named in said declaration, by delivering to him personally at Attica, in said district, a true copy thereof, and of the foregoing notes and of the notice relating thereto, together with a true copy of the notice to appear and plead endorsed thereon as herein endorsed.

(Sig'd) S. S. MATHEWS, *Marshal,*
By WM. TOWNSEND,
Dep. Marshal.

16 To which said declaration the said defendant Isaac N. Jenness afterwards, to wit, on the 23d day of October, A. D. 1878, by Geer & Williams, as his attorneys, filed his plea to said declaration with an affidavit thereto annexed, which said plea and affidavit are in the words and figures following, to wit:

Plea & affidavit.

UNITED STATES OF AMERICA.

In the circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO }
vs.
ISAAC N. JENNESS AND ALLEN FISH. }

And now comes the above-named Isaac N. Jenness, impleaded with Allen Fish, by Geer & Williams, his attorneys, and demands a trial of the matters set forth in the plaintiff's declaration.

GEER & WILLIAMS,
Att'ys for Def't Isaac N. Jenness.

STATE & EASTERN DISTRICT OF MICHIGAN,
County of Wayne:

Isaac N. Jenness, the defendant above impleaded, being duly
17 sworn, deposes and says: That at the date of the notes set forth in the plaintiff's declaration filed in this cause, and bearing date May 29, 1877, Sept. 1, 1877, May 21, 1877, Aug. 24, 1877, there was no copartnership firm or corporation in existence by the name of I. N. Jenness & Co., and that there was no person in existence who had authority to sign the firm name of I. N. Jenness & Co. to a note as maker, endorser, or otherwise.

2d. That the endorsement of I. N. Jenness & Co. on the notes, copies of which are set out in the plaintiff's declaration in this cause, dated May 29, 1877, Sept. 1, 1877, May 21, 1877, Aug. 24, 1877, is not the genuine signature and handwriting of this deponent.

3d. That the name of I. N. Jenness & Co. endorsed on the notes, copies of which are set forth in the plaintiff's declaration, dated May 29, 1877, Sept. 1, 1877, May 21, 1877, & Aug. 24, 1877, was not made by the authority, consent, or knowledge of this deponent, and that no person was a copartner of this deponent at the date of said notes who had authority in law to endorse the name of I. N. Jenness & Co. on said notes. And deponent further says if said endorsement was made by Allen Fish he had no
18 authority to make the same, either in law or by any direction or consent of this deponent.

4th. That said endorsement is not the signature of I. N. Jenness & Co.

(Sig'd) ISAAC N. JENNESS.

Subscribed & sworn to before me this 19th day of October, 1878.

LOUIS C. STANLEY,
Notary Public in & for Wayne County, Michigan.

Afterwards, to wit, on the 8th day of February, 1879, said plaintiff came into court and entered the default of said defendant for want of appearance in the words and figures following, to wit:

Default of defendant Allen Fish.

THE CITIZENS' NATIONAL BANK OF ROMEO
vs.
ISAAC N. JENNESS & ALLEN FISH.

FEB'Y 8, 1879.

On filing acceptance of service of said defendant Allen Fish, of the declaration filed in said cause, together with notice of the rule to plead endorsed thereon, and the said defendant Fish having failed to appear and plead to said declaration within the time limited by the rules and practice of this court, and on motion of George V. N. Lothrop, attorney
19 for plaintiff, ordered that the appearance of the said defendant Allen Fish be, and the same is hereby, entered, and that the default of said defendant Allen Fish in not pleading to said declaration be, and the same is hereby, entered.

(Sig'd) GEO. V. N. LOTHROP,
Att'y for Plaintiff.

Afterwards, to wit, on the 17th day of February, A. D. 1879, said came into court and entered an order in the rule-book of said court, making the default of said defendant Allen Fish absolute, with judgment interlocutory, & in the words & figures following, to wit:

Default absolute & judgment interlocutory as to def't Fish.

THE CITIZENS' NATIONAL BANK OF ROMEO
vs.
ISAAC N. JENNESS AND ALLEN FISH.

FEBRU'Y 17, 1879.

The default of the said defendant Allen Fish having heretofore been entered for want of appearance and plea or demurrer, and more than four days in term having elapsed since the entry of said default, on motion of George V. N. Lothrop, attorney for plaintiff, ordered that the default of the said defendant Allen Fish be, and the same is hereby, made absolute, with interlocutory judgment for said plaintiff, and that it be referred to a jury, to be empanneled in said cause to assess plaintiff's damages.

GEO. V. N. LOTHROP,
Attorney for Plaintiff.

20 Afterwards, to wit, on the 16th day of September, A. D. 1879, came the said parties, by their respective attorneys, and filed their stipulation in said cause in the words and figures following, to wit:

Stipulation to amend declaration.

In the circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO }
vs.
ISAAC N. JENNESS & ALLEN FISH. }

It is hereby stipulated that the plaintiff may amend his declaration in this case by adding to his notice, annexed to the common counts, copies of the notes following; that the execution and endorsement thereof shall be considered as denied by said defendant Jenness, and that the cause shall stand at issue by said Jenness and at default by said Fish without any further pleading or return.

$2,000.] PORT HURON, *Nov.* 27, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

$2,000.] PORT HURON, *Dec.* 4, 1877.

21 Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Endorsed:) I. N. Jenness & Co.

$500.] ATTICA, LAPEER CO., MICH., *Dec. 3d*, 1877.

Three months after date we promise to pay to the order of A. & H. Fish five hundred dollars, at Citizens' Nat. Bank, Romeo, Mich. Value received.

(Sig'd) I. N. JENNESS & CO.

(Indorsed:) A. & H. Fish.

$1,488.05.] ATTICA, LAPEER CO., MICH., *Dec.* , 1877.

Three months after date we promise to pay to the order of A. & H. Fish fourteen hundred eighty-eight $\frac{05}{100}$ dollars, at Citizens' Nat. Bank, Romeo, Mich. Value received.

(Sig'd) I. N. JENNESS & CO.

(Endorsed:) A. & H. Fish.

Detroit, Sept. 9, 1879.

(Sig'd) GEO. V. N. LOTHROP,
Att'y for Pl'ff.

" H. GEER,
Att'y for Def't Jenness.

P'r E. W. MEDDAUGH,
Counsel.

(Sig'd) ALLEN FISH.

22 Thereupon, on said 16th day of September, A. D. 1879, said plaintiff, by its said attorney, came into said court and filed its amendment to said declaration in the words and figures following, to wit:

Amendment to declaration.

In the circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO }
vs.
ISAAC N. JENNESS AND ALLEN FISH. }

In pursuance of the stipulation filed in this cause the plaintiff hereby amends his declaration by adding the following copies of notes, to stand as additional copies under the notice attached to the common counts of said declaration:

$2,000.] PORT HURON, *Nov. 27th*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.] PORT HURON, *Dec.* 4, 1877.

Three months after date we promise to pay to the order of I. N.
23 Jenness & Co. two thousand dollars, at the Citizens' National Bank, Romeo. Value received.

(Sig'd) A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$500.] ATTICA, LAPEER CO., MICH., *Dec. 3d*, 1877.

Three months after date we promise to pay to the order of A. & H. Fish five hundred dollars, at Citizens' Nat. Bank, Romeo, Mich. Value received.

(S'g'd) I. N. JENNESS & CO.

(Indorsed:) A. & H. Fish.

$1,488.05.] ATTICA, LAPEER CO., MICH, *Dec.* 18, 1877.

Three months after date we promise to pay to the order of A. &. H. Fish fourteen hundred eighty-eight $\frac{05}{100}$ dollars, at Citizens' Nat. Bank, Romeo, Mich. Value received.

(S'g'd) I. N. JENNESS & CO.

(Indorsed:) A. & H. Fish.

(S'g'd) GEO. V. N. LOTHROP,
Att'y for Pl'ff.

24 *Venire.*

Therefore, to try the issue above joined, let a jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves on the jury.

Verdict.

And the jurors of that jury, of whom mention is made, to wit: Morris Brenahan, Thurlow Pierce, Francis A. Dewey, Theodore J. Hill, Morgan D. Lacy, George Smith, Amasa A. Harper, John Quackenbush, Henry C. Hall, Henry B. Mowry, Edmund Fitzgerald, and John Hickey, who were on the fourteenth day of November, A. D. 1879, duly elected, tried, and sworn well and truly to try the issue joined in this cause, and hear the evidence in the cause and the arguments of counsel, and after receiving the charge of the court retired to their room to consult of their verdict, in charge of the officers sworn to attend them; and upon returning into court and being enquired of as to their verdict, said jury say they find the said defendants did undertake and promise in manner and form as said plaintiff hath in its declaration alleged against them, and on occasion thereof assess the plaintiff's damages against the said defendants at the sum of seven thousand two hundred and seventy-five dollars and sixteen cents ($7,275.16).

25 And on motion of defendants, on the fifteenth day of November, A. D. 1879, the day of the rendition of said verdict, it was ordered by the court that said defendants have twenty days in which to move for a new trial of said cause.

Afterwards, to wit, on the twenty-fourth day of November, A. D. 1879, said defendants came into said court by their said attorneys, and filed and entered a motion to set aside the verdict, and for a new trial of said cause, which motion is in the words and figures following, to wit:

The circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO,
vs.
ISAAC N. JENNESS ET AL.

And now comes the said defendant in this cause, by Harrison Geer, his attorney, and moves to set aside the verdict in this cause, and for a new trial, for reasons as follows, to wit:

First. Because the verdict was manifestly against the weight of evidence.

26 Second. Because the court erred in instructing the jury that they might find defendant liable on the ground of a ratification by him of the act of the witness Fish in signing the name of defendant to the notes in suit, when there was in fact no evidence in the cause tending to show such ratification.

Third. Because the court erred in leaving it to the jury to find such ratification from circumstances when there were no circumstances of such a tendency proven.

Fourth. Because the court erred in instructing the jury as follows: "And so may the ratification be implied from the circumstances. If you find that their method of doing business is such as to induce you to believe that Mr. Jenness did in fact expect Mr. Fish to indorse these notes in his name * * * or that having indorsed them so he ratified them, in that case the plaintiff is entitled to recover."

(S'g'd) HARRISON GEER,
Att'y for said Def't.

Nov. 24, '79.

Afterwards, to wit, on the seventeenth day of January, A. D.
27 1880, the motion of said defendants for a new trial of said , argued in part by counsel for the respective parties and continued for further hearing.

And afterwards, to wit, on the twenty-first day of April, A. D. 1880, the arguments of counsel on said motion for new trial were concluded, and the case submitted to the court for decision.

Afterwards, to wit, on the twenty-sixth day of April, A. D. 1880, the court aforesaid, before the judges thereof, having considered the motion of said defendants for a new trial, together with the arguments of counsel thereon, ordered that said motion be, and the same was thereupon, denied.

And thereupon afterwards, to wit, on the twenty-sixth day of April, A. D. 1880, said plaintiff, by his said attorney, came into the court aforesaid, before the judges thereof, and moved the court that a judgment be entered on the verdict here'fore rendered in said cause; and thereupon the court rendered a judgment thereon in the words and figures following, to wit:

Judgment.

THE CITIZENS' NATIONAL BANK OF ROMEO
vs.
ISAAC N. JENNESS & ALLEN FISH.

28 The jurors empaneled and sworn to try the issue joined in this cause having heretofore, to wit, on the fifteenth day of November, A. D. one thousand eight hundred and seventy-nine, rendered a verdict in said cause in favor of said plaintiff against the said defendants in the sum of seven thousand two hundred and seventy-five dollars and sixteen cents, it is therefore considered by the court now here that the said plaintiff, The Citizens' National Bank of Romeo, do recover of the said defendants, Isaac N. Jenness and Allen Fish, the said sum of seven thousand two hundred and seventy-five dollars and sixteen cents ($7,275.16) damages assessed as aforesaid, together with the said plaintiff's costs of this suit to be taxed, & this judgment to bear interest from November 15, 1879, the day of the rendition of said verdict.

Afterwards, to wit, on July 28, 1880, plaintiff's costs were taxed in said cause at the sum of $62.82.

Afterwards, to wit, on the twenty-ninth day of May, A. D. 1880, on motion of defendants, it was ordered by the court that the time to settle bill of exceptions in the cause be extended to June 15, 1880.

Afterwards, to wit, on the fourteenth day of June, A. D. 1880,
29, 30 on motion of defendants, it was ordered by the court that the time to settle bill of exceptions in said cause be further extended to the 26th day of June, A. D. 1880.

Afterwards, to wit, on the 27th day of July, A. D. 1880, said defendant, Isaac N. Jenness, came and filed in said court a notice to said defendant, Allen Fish, to join in the writ of error in said cause, with proof of service attached, & affidavit that said defendant had failed to appear and join in the *the* writ of error; which notice and affidavit are in the words and figures following, to wit:

31 *Notice to def't Fish to join in writ of error & proof of service, &c.*

The circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO, plaintiff,
vs.
ISAAC N. JENNESS AND ALLEN FISH, DEF'TS.

To ALLEN FISH, Esq.:

SIR: You are hereby notified that on Monday, the 26th day of July, 1880, I shall sue out a writ of error for the purpose of removing said cause to the Supreme Court of the United States; opportunity is hereby given you of joining with me on or before that day as plaintiff in error in said cause.

Yours,
(Sig'd) ISAAC N. JENNESS,
By GEER & WILLIAMS,
His Att'ys.

MEDDAUGH, DIGGS & HARMON,
Of Counsel.

Dated JULY 7TH, 1880.

32 STATE OF MICHIGAN,
County of St. Louis, ss:

Fred. W. Smith, being first duly sworn, says that on the 9th day of July, A. D. 1880, at Duluth, in the county of St. Louis and State of Minnesota, he served the within notice on Allen Fish, one of the defendants therein named, personally, by delivering to and leaving with said Allen Fish a true and correct copy of said notice at the time and place aforesaid.

(Sig'd) F. W. SMITH.

Subscribed and sworn to before me this 10th day of July, 1880.
(Sig'd) JOHN R. CAREY,
United States Court Commissioner, District of Minnesota.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Henry A. Harmon, being duly sworn, deposes and says that the defendant Allen Fish has failed to appear and join in the writ of error in said cause.

(Sig'd) HENRY A. HARMON.

Subscribed and sworn to this 27th day of July, A. D. 1880, before me.
ADDISON MANDILL,
Comm'r Circuit Court U. S., E. D. of Mich.

(Endorsed:) Filed July 27th, 1880. A. Mandill, clerk.

33 In the circuit court of the United States for the eastern district of Michigan.

THE CITIZENS' NATIONAL BANK OF ROMEO
vs.
ISAAC N. JENNESS & ALLEN FISH.

The issue joined between the parties in this cause came on to be tried on the 14th day of November, A. D. 1879, before the Hon. Henry B. Brown, acting as circuit judge of said court, and both parties being ready, and a jury of good and lawful men having been duly empanneled to try the said issue, the counsel for the plaintiff, to maintain its issue, offered in evidence three promissory notes, as follows;

FIRST.

$400.00.] ATTICA, LAPEER COUNTY,
December 21*st*, 1876.

Two months after date we promise to pay to the order of A. & H. Fish four hundred dollars, at Citizens' National Bank of Romeo. Value received.

(S'g'd) I. N. JENNESS & CO.
(Ind.:) A. & H. Fish.

SECOND.

A note of five hundred dollars, dated December 3rd, 1877, payable same as first note, two months after date.

(Signed) I. N. JENNESS & CO.
(Indorsed:) A. & H. Fish.

Third was a note December 3rd, 1877, for $1,488.05, payable same as first, three months after date.

(Signed) I. N. JENNESS & CO.
(Indorsed:) A. & H. Fish.

These notes being received without objection, plaintiff's counsel called John Smith, jr., who was sworn, and testified that there was due on these three notes $2,669.03. Witness further testified that he resided in Bruce,

Macomb County, and was vice-president and one of the directors of the plaintiff's bank, and had been since its organization. Know Jen-
34 ness and Allen Fish; did not know Henry Fish in his life-time; know handwriting of Jenness; I have heard Allen Fish say that Allen Fish, Henry Fish, and Isaac N. Jenness composed the firm of I. N. Jenness & Co.

Plaintiff then put in evidence the two series of notes, called first and second series, copies of which are as follows:

FIRST SERIES.

$2,000.00.] ATTICA, LAPEER COUNTY, MICH., *November 25th*, 1876.

Ninety days after date we promise to pay to the order of I. N. Jenness $2,000.00, at the Citizens' National Bank of Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness.

$2,000.00.] PORT HURON, *February 26th*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. $2,000.00, at the Citizens' National Bank of Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *May 29th*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. $2,000.00, at the Citizens' National Bank of Romeo.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *Sept. 1st*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank of Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *Dec. 4th*, 1877.

Three months after date we promise to pay to the order of I. N.
35 Jenness & Co. two thousand dollars, at the Citizens' National Bank of Romeo, value received.

A. &. H. FISH.

(Indorsed:) I. N. Jenness & Co.

SECOND SERIES.

$2,000.00.] PORT HURON, *March 10th*, 1877.

Sixty days after date we promise to pay to the order of I. N. Jenness

two thousand dollars, at the American National Bank, Detroit, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Thomas S. Skinner.

$2,000.00.] PORT HURON, *May 21st*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at the Citizens' National Bank of Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *August 24th*, 1877.

Three months after date we promise to pay to the order of I. N. Jennings & Co two thousand dollars, at the Citizens' National Bank, Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

$2,000.00.] PORT HURON, *Nov. 27th*, 1877.

Three months after date we promise to pay to the order of I. N. Jenness & Co. two thousand dollars, at Citizens' National Bank, Romeo, value received.

A. & H. FISH.

(Indorsed:) I. N. Jenness & Co.

The plaintiff also gave evidence of the due presentment for payment of the last note of each of said series, of refusal of payment, and of due protest of said notes, and of due notice of such presentment and non-payment to the defendants.

36 The counsel for plaintiff then produced to the witness what are called the first series of promissory notes, and the testimony of said witness proceeded as follows:

Q. Look at the note dated November 25th, 1876, of $2,000.00, and state what knowledge you have of the transaction which is indicated by that note.

A. I know the signature on the face of the note of A. & H. Fish as being the handwriting of Allen Fish, and the indorsement on the back, I. N. Jenness, is the handwriting of Isaac N. Jenness. I cannot say that I positively know of the negotiation of that note.

Q. Look at the next note, of February 26th, and tell me what you know about that note.

A. This is 1877. The signature on the face, A. & H. Fish, is in the handwriting of Allen Fish, and the indorsement on the back, I. N. Jenness & Co., is in the handwriting of Isaac N. Jenness. I cannot say that I have any positive knowledge of its negotiation at the bank. I have seen it at the bank, but it is very likely that I was not at the bank when it was renewed.

Q. Look at the following note, of May 29th, 1877, of $2,000.00, and see whether you know anything of that note or of the negotiation of it.

A. This is a note in renewal of a previous note, and the signature on

the face, A. & H. Fish, is in the handwriting of Allen Fish, and the indorsement on the back, I. N. Jenness & Co., is in the handwriting of Allen Fish. I do not recollect that I had any personal knowledge of the making of it at the time.

Q. Look at the next note, of September 1st, 1877, for the sum of $2,000.00.

A. That is given in renewal of the previous note. The signature on the face is by Allen Fish, signed A. & H. Fish, and indorsed on its back I. N. Jenness & Co. by Allen Fish. I had no personal knowledge of the negotiation of that note. I had some conversation with Jenness about that last note here, dated December 4th, 1877, in January, 1878. I cannot fix the time. About the middle of the month I was at Lapeer, and

37 Mr. Jenness came to me in the court-house and spoke to me of the indebtedness of the firm of I. N. Jenness & Co. to the Citizens' National Bank, and of the $4,000 which was due by A. & H. Fish likewise. He said that he wanted to see some of us about it. Asked him if there was likely to be any loss to him in the matter connected with the assignment which Allen Fish had made to him of their interest in the firm of I. N. Jenness & Co., and he said a little, not much. I am not sure whether he said he would see me on the cars going home again or not, but the conversation that occurred at the court-house was taken up in the cars relative to the matter of our account. He, on the cars, said that the notes of I. N. Jenness & Co. would be paid if he could make collections, and I asked him then about the $4,000 of Mr. Fish that is due on the $2,000 note at the end of this series, and the two thousand dollars due at the end of the other series. He said that probably we would have to wait some time for that; ultimately he thought it would be paid, but probably the interest would have to be reduced. I suggested to him that I. N. Jenness & Co. was the indorser on that, and that he had better take the $4,000 himself and settle it with us. He replied, "You had better keep it. It is their paper and for them to pay." And that was all the conversation that I ever had directly with Mr. Jenness as to the $4,000.

SAMUEL A. REED was then called and sworn as a witness on behalf of the plaintiff, and testified as follows:

I live at Romeo; am cashier of the Citizens' National Bank of Romeo. (The notes shown previous witness were then shown witness.) I have seen those notes in our bank. The first note was negotiated at our bank. The second is a renewal of the first, the third is a renewal of the second, and the fourth is a renewal of the third, and the last a renewal of the fourth—a series of renewals right through. The business was done entirely by letter. Letters came from what purported to be the firm of A. & H. Fish, at Port Huron.

38 Q. When did you first know that there was any question about the signature of I. N. Jenness & Co. upon the notes that are not indorsed, as you now understand it, by Mr. Jenness in person?

A. I thought nothing about it nor had my attention called to until it after the assignment of A. & H. Fish; that was after the negotiation of the last note.

ALLEN FISH, a witness called and sworn on behalf of the plaintiff, testified as follows:

I live at Port Huron; I have lived there a good many years. Am one of the firm of A. & H. Fish, and was one of the firm of I. N. Jenness & Co. A. & H. Fish commenced doing business over 25 years ago; I. N. Jenness & Co. commenced doing business some 10 or 12 years ago. The firm of I. N. Jenness & Co. was composed of I. N. Jenness, Allen and Henry Fish, and the firm of A. & H. Fish of Allen and Henry Fish. The place of business of I. N. Jenness & Co. was at Attica. Their principal business was manufacturing and selling lumber; they also carried on a mercantile and grain business to a certain extent. The business of A. & H. Fish was carried on at Port Huron. The larger part of the lumber manufactured by I. N. Jenness & Co. was handled and sold at Port Huron, by A. & H. Fish; some was sold at the mill direct. Henry Fish died May 6th, 1876. The firm of I. N. Jenness & Co. continued as originally down to the time of his death; also the firm of A. & H. Fish. After the death of Henry Fish the old business of I. N. Jenness & Co. was carried on under the name of the old firm by Isaac N. Jenness and myself; we continued to do business until the latter part of December, 1877. I continued to carry on the business at Port Huron, under the name of A. & H. Fish.

The same series of notes shown the witness Smith was here shown to the witness Fish, who then said:

The signature to the first note, dated Nov. 23rd, 1876, is in my handwriting, and the indorsement is in the handwriting of I. N. Jenness. The note given in renewal thereof is signed the same way, and dated February 26th, 1877.

Q. Do you remember for whom the money was raised and used obtained from those notes—the first note and the renewal thereof, in-
39 dorsed by Jenness in person?

(Objected to by defendant's counsel as irrelevant and immaterial; objection overruled by the court and defendant's counsel excepted to the ruling.)

A. It was used for the benefit of the business that was being carried on by I. N. Jenness & Co. The next note, and also the two other notes of this series, are signed by me, and the indorsement of I. N. Jenness & Co. on the same is in my handwriting. Mr. Jenness knew they were renewed. He never made any objection to me for my use of the name of I. N. Jenness & Co. on the renewal of them.

Cross-examination:

All the money raised on the $2,000 note of November 25th, 1876, went into the busines' of I. N. Jenness & Co., into the general prosecution of the business. I am not able to say in just what particular. I cannot state where a dollar went into the business of I. N. Jenness & Co. When I made that note the money was sent by the bank to A. & H. Fish, to Port Huron. After I made the first note I had Jenness indorse it personally; that note was renewed by the second note made by me, and I had Jenness indorse that personally; when this note was renewed I signed it and indorsed it I. N. Jenness & Co. I do not think I had any conversation with Jenness about its renewal; I had no conversation with Jenness with reference to indorsing them after I made this indorsement of I.

N. Jenness & Co. It was understood these specific notes were to be renewed; we often talked them over; we were not ready to pay them. I am not able to say that I had any talk with Jenness the day I renewed the note.

Redirect:

Mr. Jenness and I were in the habit of talking freely of our business and these notes, particularly after my brother's death. I talked more freely with him because my brother used to do the business at Port Huron before. I was at Attica after that; I went down there and consulted him more than previously, and when there was paper to be paid at the bank we always talked it over—how it should be adjusted, and if
40 we had money to pay it with; if we did not, of course we would get a renewal if we could.

On recross-examination this witness said:

Every one of the notes that had to be renewed I had a talk with Jenness about. I used to go out to Attica every week. I told you three times; I cannot tell when and where. I do not mean generally at all. Every note when these notes were coming due we talked it over. In November, 1876, he indorsed it in person, and so when he renewed it in February, 1877. The reason why he did not indorse it in May, 1877, is because he was in California. I talked to him before he went away. I am not able to say when; but we had a good deal of talk how we should manage things. When I say "things" I mean this note and all we had out. When the note was renewed again, Sept. 1st, Jenness had returned.

Q. Why did not you have him indorse it himself, as he had previously done?

A. Oh, it was more convenient for me to indorse it; put the same indorsement on it that was on it last; that was all. The same rule holds good in all the renewals after that—simply for convenience. After January, 1876, I do not think there was a great deal of paper Jenness indorsed in person.

Q. And you were in the habit when you wanted his indorsement of making it payable to yourself or his order, and have him indorse it individually, and not in the company's name?

A. Not in all cases.

Q. Do you know but one note where he signed the note as I. N. Jenness & Co. as indorser?

A. I do not recollect.

Q. Was it not generally signed by him individually, I. N. Jenness?

A. Yes, sir; when the indorsement was made.

Q. When he wanted you to indorse payable to the order of A. & H. Fish, you indorsed it and then returned it?

A. Yes, sir.

Q. After you commenced to indorse in the name of I. N. Jenness & Co. you never sent any paper to him, did you?

A. Yes, sir; I think he indorsed after that. I have no distinct recollection now of ever having had any conversation with Mr. Jenness
41 at or subsequent to the time of my indorsing the name of I. N. Jenness & Co. on the back of those particular notes.

Upon a further examination the counsel for plaintiff produced to the

witness the promissory notes known as the second series, and the witness said:

The first note is dated March 10th, 1877; signed A. & H. Fish; made payable to the order of I. N. Jenness & Co., at the American National Bank, Detroit, 60 days after date, and was indorsed I. N. Jenness & Thomas Skinner. I signed the name A. & H. Fish to that note, and the indorsement is in the handwriting of Mr. Jenness and Mr. Skinner. To take up that note I got a note discounted at the Citizens' National Bank of Romeo, and the money which I received on that note I paid on this note at the American National Bank. That note discounted at the Citizens' National Bank of Romeo was signed A. & H. Fish, dated May 21st, 1877, for $2,000, payable three months after date. That was indorsed I. N. Jenness & Co. in my own handwriting. That note was renewed by one dated August 24th, 1877, with the same signature and indorsement, both made by me. That was renewed by a note dated Nov. 7th, 1877, for the same amount, with same signature and indorsement, both made by me. At the time the note given to the American National Bank became due Mr. Jenness was away from home, in California. Before Jenness went away from home I had a conversation with him about taking up this note at the American National Bank. My recollection is there was a note filled out, signed A. & H. Fish, but the place of payment was left blank, indorsed by Mr. Jenness. I came to Detroit, but the American National Bank did not wish to renew. I did not know whether they would or not, and that was the reason it was left blank. I went to the Merchants' & Mechanics' Bank, and they said they would take the paper, and I filled out the paper to that bank; but when that was done the cashier objected to taking the paper because of the filling out after Mr. Jenness' indorsement, without his knowledge. He made that point, and said he would write to Mr. Jenness for his consent. I told him it would be of
42 no use, for it would not reach him, and so the money was not obtained there. And then I made a note payable to the Romeo bank, as you see there, making the indorsement, I. N. Jennings & Co., myself, and they furnished the money, and I took it and paid the note at the American National Bank. While this note was running, and after Jenness got back from California, I told him all the facts. He made no objection. The renewal notes were made in the same way by my signature.

Cross-examination:

I cannot tell when or where I had the talk with Jenness about this note; it was after he came back from California; I think in June, 1877. I have no specific remembrance of any talk about this series of renewal notes except the first one. The first I remember because of this peculiarity. Remember nothing in particular as to the others.

Plaintiff rested his case.

Thereupon th' counsel for the defendant Jenness asked the court, under the law and evidence given on the trial, to direct a verdict for defendant Jenness upon the two series of notes and the renewals thereof. The court refused to grant the request, and defendant's counsel excepted.

Counsel for the defendant, to maintain and prove the issue on his part, called Isaac N. Jenness, the defendant, who was sworn and testified as follows:

I reside in Attica. I know Allen Fish and knew Henry Fish in his life-time. (The note here referred to of $2,000, dated November 25th, 1876, and given to plaintiff, was shown witness and identified.) I indorsed that note. That money was for A. & H. Fish; it was not used in the business of I. N. Jenness & Co. When that note became due it was renewed and indorsed, in my handwriting, I. N. Jenness & Co. The note, it seems, was made payable to the order of I. N. Jenness & Co.; it was the only one I ever indorsed in that way. Why I did so I cannot say; it was a mistake. When A. & H. Fish wanted to make paper payable at any bank they sent the notes to me for my personal indorsement. After I renewed it that time I never knew what became of the note. I never authorized Mr. Fish to renew that paper, indorsing it I. N. Jenness
43 & Co. Mr. Fish never had any authority from me, directly or indirectly, to use the name of I. N. Jenness & Co. on his paper. I never had any conversation with him subsequently that it must be renewed; that is true of each of these renewals. I remember of a note being made payable at the American National Bank of Detroit for $2,000. I indorsed that note with Thomas S. Skinner. Fish afterwards told me it had been paid; that he got the money of the Citizens' National Bank of Romeo. At the time the note was made to the Citizens' National Bank of Romeo I was in California. I went there about the middle of May, 1877, and returned the latter part of June. I don't think I ever had any talk with Allen Fish after I returned about his having made the note at the Citizens' National Bank of Romeo and his indorsing it I. N. Jenness & Co. I never authorized him to indorse it in that way. (The several renewal notes were shown witness.) I never authorized Fish to sign my name to them or indorse the name I. N. Jenness & Co.

Cross-examination:

The original firm of I. N. Jenness & Co. was composed of Allen Fish, Henry Fish, and myself. Henry Fish died in May, 1876. Allen Fish and I continued the business under the old firm-name for about two years to close up the business. We made notes for our business in the name of I. N. Jenness & Co. No one else was interested in that firm except Allen Fish & myself. (The first three notes offered in evidence, given for $400, $500, and $1,488.05, were shown witness and identified.) All are made in the name of I. N. Jenness & Co.; I do not dispute them; they were all made after the death of Henry Fish. Knew of the note to the American National Bank when I went to California. I cannot remember positively about the indorsem't I gave Fish to renew it before I went away.

Q. You had no knowledge of any payment of this paper that bore your indorsement?

A. All the knowledge I had was that the notes were not protested.

Q. But you had no knowledge of their payment. Did you suppose for one minute that paper had been paid?

A. It is paid, it seems; marked so.

43½ Did you suppose for one minute that paper had been paid in any way but by renewal?

A. I could not say as to that.

The defendant rested his case.

This is substantially all the evidence given on the trial of said cause. Counsel for defendant Jenness, after the proofs were closed, again re-

quested the court to direct a verdict in his favor on the two series of notes of $2,000 each, for the reason that the proof was insufficient to entitle the plaintiff to recover upon them. The court refused the request, and counsel for defendant Jenness duly excepted. The court thereupon charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action upon certain promissory notes of which the defendant, Mr. Jenness, is either maker or indorser. There is no doubt that the plaintiff is entitled to recover $2,669.03 upon certain notes about which there is no dispute and no defense interposed. So that if upon the matters in dispute you think the evidence preponderates in favor of the defendant you will still render a verdict for the plaintiff for $2,669.03. The main question in this case turns upon the liability of Mr. Jenness on two series of notes made by A. & H. Fish, and indorsed by I. N. Jenness & Co., the indorsements having been made by Mr. Allen Fish. It appears that there were two firms having close business
44 connections, one of the firms, A. & H. Fish, doing business at Port Huron, and the other, the firm of I. N. Jenness & Co., doing business at Attica, in the county of Lapeer; that on the 26th day of May, 1876, both of these firms were dissolved by the death of Mr. Henry Fish. Upon that dissolution the authority of one member of the firm to make or indorse paper for the firm and in the name of the firm ceased, and Mr. Isaac N. Jenness can only be held upon the paper indorsed in the name of I. N. Jenness & Co. by Mr. Fish upon the theory that Mr. Fish was authorized by Mr. Jenness so to indorse this paper.

With regard to the first series of notes, which commenced in November, 1876, after the death of Mr. Henry Fish, it appears that the first note was made by A. & H. Fish, presumptively, and so far as this case is concerned, for the business of Mr. Fish, or for the business of that firm, to the order of I. N. Jenness, & was indorsed by Mr. Jenness personally. Of course he would have been liable upon that note upon its maturity. But the note was taken up and a new note given, made by the same parties, and indorsed by Mr. Jenness in the name of I. N. Jenness & Co., as it is claimed by him, by mistake, for the firm of I. N. Jenness & Co.; but that is a matter of small importance, as in either case Mr. Jenness would be held, the indorsement having been made by himself. This note was not paid at maturity, but a new note was thereupon given by Mr. Fish in the name of A. & H. Fish, and instead of taking it to Mr. Jenness and having him indorse it, the note was indorsed I. N. Jenness & Co. by Mr. Fish. The first note was made payable to the order of Mr. Jenness and was indorsed by him; the second note was made payable to the order of I. N. Jenness & Co. and was indorsed by Mr. Jenness. On maturity of the second note, Mr. Jenness being in California, and Mr. Fish then assuming that he had authority, signed a third, and it is for you to say whether he had authority to do so or not. Mr. Fish made the note payable to the order of I. N. Jenness & Co., and himself wrote upon the back the name of I. N. Jenness & Co.

A JUROR. Did I understand you that Mr. Jenness wrote upon
45 the back of the note?

The COURT. Mr. Fish wrote on the back of the note I. N. Jenness & Co., Mr. Jenness then being in California.

The firm of I. N. Jenness & Co. having been dissolved by the death of

Mr. Henry Fish, Mr. Jenness cannot be held upon that indorsement or upon any of the indorsements following that, and made in the same way, unless Mr. Fish had authority from Mr. Jenness to make those indorsements, or unless his making those indorsements was subsequently ratified by Mr. Jenness. It is for you to say whether he had such authority or whether such ratification was made. In the second series of notes much the same course was pursued. The first note matured at the American National Bank here, and went to protest. Nine days thereafter Mr. Fish, having a blank indorsement of Mr. Jenness, endeavored to negotiate for money to pay that note with, but failed. He then went to the plaintiff at Rome and made a new note in the name of A. & H. Fish, indorsed it in the name of I. N. Jenness & Co., Mr. Jenness then being in California. The liability of Mr Jenness upon that endorsement depends upon the same rule I have stated to you as prevailing in the other case, viz: Was Mr. Fish authorized to indorse the name of I. N. Jennes & Co. by Mr. Jenness, or was his action in so doing subsequently ratified by Mr. Jenness? Now, gentlemen, I am not going into an elaborate examination of the evidence of the authority and the ratification in this case. The hour is a late one. The evidence is conflicting and depends upon the view you shall take of the testimony upon this point of Mr. Fish and Mr. Jenness. Mr. Fish says that he was authorized to make the indorsements and to carry this paper along in the name of I. N. Jenness & Co., and use Mr. Jenness' name for that purpose. On the other hand, Mr. Jenness swears positively that he had no such authority; that he intended to terminate his liability upon the paper of A. & H. Fish, and that he never subsequently ratified the indorsement. Accordingly as you find this authority or ratification
46 then the plaintiff or defendant is entitled to your verdict upon these notes. The burden of proof is upon the plaintiff. It is not necessary that you should find absolute express authority in so many words to do it, but it may be implied from the circumstances of the case, and so may the ratification be implied from circumstances. If you find that their method of doing business is such as to induce you to believe that Mr. Jenness did in fact expect Mr. Fish to indorse these notes in his name, or that he did authorize him to indorse them in his name, or, that having indorsed them so, he ratified his action, the plaintiff is entitled to recover; but the burden of proof is on the plaintiff to show authority or ratification, because the firm having been dissolved by the death of Henry Fish it did not belong to Mr. Allen Fish to do this as a matter of law.

First. The counsel for defendant Jenness did then and there except to so much and such parts of the general charge of the court as submitted to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness or I. N. Jenness and Co. in the renewal of the first series of notes bearing date November 25th, 1876, which note was first renewed by Allen Fish Sept. 1st, 1877, for the reason that there was no evidence of authority shown authorizing it.

Second. Counsel for defendant Jenness did then and there except to such part and so much of the general charge of the court as submitted to the jury, the question of authority of Allen Fish to use the name of Isaac N. Jenness or I. N. Jenness & Co. in the indorsement of the first note of the second series, bearing date May 21st, 1877, for the reason that there was no evidence of authority shown authorizing it.

Third. Counsel for the defendant Jenness did then and there except to so much and unto such parts of the general charge of the court separately and not generally as submitted, the question of authority of Allen Fish to use the name of Isaac N. Jenness or I. N. Jenness & Co. in each of the subsequent renewals of each of the series of notes, for the reason
47 that there was no evidence of authority shown authorizing it.

Fourth. Counsel for defendant Isaac N. Jenness did then and there except to so much and unto such parts of the general charge of the court separately and not generally as submitted to the jury the question of ratification on the part of Jenness in the use of his name, or that of I. N. Jenness & Co. in the making or renewal of any of the notes in the first or second series, for the reason that there is no evidence of ratification shown authorizing the charge of the court.

Fifth. The counsel for defendant Jenness did then and there except to that part or portion of the general charge of the court as follows: "It is not necessary that you should find absolute express authority in so many words to do it, but it may be implied from circumstances. If you find that their mode of doing business is such as to induce you to believe that Mr. Jenness did, in fact, expect Mr. Fish to indorse these notes in his name, in that case plaintiff is entitled to recover."

Sixth. Counsel for defendant did then and there except generally to the charge of the court as given, and under the instruction of said circuit judge the said issue was then and there submitted to the jury, who, after having retired to deliberate on their verdict, and having returned into court, rendered a verdict in favor of the plaintiff for the sum of $7,275.16, and inasmuch as none of said matters as aforesaid appear of record in this cause, this bill of exceptions is settled and signed by said circuit judge, pursuant to the statute in such case made and provided, on this 14th day of November, A. D. 1879.

HENRY B. BROWN. [L. S.]

47½ (Indorsed:) The circuit court of the U. S. for the E. D. of Mich'g'n. The Citizens' Bank of Romeo vs. Isaac N. Jenness et al. Bill of exceptions. File June 28, '80. A. Mandell, cl'k.

48 *Assignment of errors.*

In the circuit court of the United States for the eastern district of Michigan.

ISAAC N. JENNESS, IMPLEADED WITH ALLEN Fish, plaintiff in error,
vs.
THE CITIZENS' NATIONAL BANK OF ROMEO, defendant in error.

Assignment of error.

And now comes the said plaintiff in error, by E. W. Meddaugh, his attorney, and says that in the record and proceedings in this cause in the court below, and the rulings and charges, and in giving the judgment therein, manifest error has intervened to his detriment, whereof he specially assigns the following, to wit:

First. The court erred in allowing the witness Allen Fish to answer the following question under the objection taken as set forth in the bill of exceptions, viz: "Do you remember for whom the money was raised & used obtained from those notes, the first note, and the renewal thereof, indorsed by Jenness in person?"

Second. The court below also erred in refusing to direct a verdict for the defendant Jenness, for reasons set forth in the bill of exceptions, after the plaintiff had rested its case.

Third. The court below erred in refusing to direct a verdict for the defendant Jenness, for reasons set forth in the bill of exceptions, after all the evidence in the case had been closed.

Fourth. The court below erred in his general charge to the jury, wherein the court submitted to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness or I. N. Jenness & Co. in the renewal of the first series of notes, bearing date November 25th, 1876, which note was first renewed by Allen Fish, September 1st, 1877,
49 for the reason there was no evidence of authority shown authorizing it.

Fifth. The court below erred in his general charge to the jury wherein the court submitted to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness or I. N. Jenness & Co. in the indorsement of the first note of the second series, bearing date May 21st, 1877, for the reason there was no evidence or authority shown authorizing it.

Sixth. The court below erred in his general charge to the jury wherein the court submitted to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness or the name of I. N. Jenness & Co. in each of the subsequent renewals of each of the series of notes, for the reason there was no evidence of authority shown authorizing it.

Seventh. The court below erred in his general charge to the jury wherein the court submitted to the jury the question of ratification on the part of Jenness in the use of his name or that of I. N. Jenness & Co. in the making or renewal of any of the notes in the first or second series, for the reason there is no evidence of ratification shown authorizing the charge of the court.

Eighth. The court below erred in his general charge to the jury, which reads as follows: "It is not necessary that you should find absolute express authority in so many words to do it, but it may be implied from circumstances. If you find that their mode of doing business is such as to induce you to believe th't Mr. Jenness did in fact expect Mr. Fish to indorse these notes in his name, in that case plaintiff is entitled to recover."

Ninth. The court below erred in his general charge to the jury, for reasons set forth in the bill of exceptions.

Wherefore the said Isaac N. Jenness, plaintiff in error as aforesaid, prays that the judgment rendered in this cause, in the court below, for the errors aforesaid, may be reversed, annulled, and altogether held for
50 naught, and that he may be restored to all things which he has lost by reason thereof.

E. W. MEDDAUGH,
Attorney for Plaintiff in Error.

(Indorsed:) U. S. circuit court, east. dist. Michigan. Isaac N. Jenness, impleaded with Allen Fish, plaintiff in error, vs. The Citizens' National Bank of Romeo, defendant in error. Assignment of error. E. W. Meddaugh, att'y for pl't'ff in error.

51 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the sixth circuit and eastern district of Michigan, do hereby certify the above and foregoing to be a true copy of the original record and proceedings in said court in the case of The Citizens' National Bank of Romeo against Isaac N. Jenness and Allen Fish (the same being the case of Isaac N. Jenness impleaded with Allen Fish, plaintiff in error, against The Citizens' National Bank of Romeo, defendant in error); that I have carefully compared the same with such original, and certify the same to be a correct transcript therefrom and of the whole of such original record and proceedings.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court of Detroit this 4th day of October, in the year 1880.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $19.60; postage, 45—$20.05.

(Indorsement on cover:) No. 175. Isaac N. Jenness (impleaded with Allen Fish), plaintiff in error, vs. The Citizens' National Bank of Romeo. E. Michigan, C. C. U. S. Filed 23rd October, 1880.

110-52

OFFICE SUPREME COURT U. S.
FILED
NOV 23 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT
OF
The United States.

OCTOBER TERM, 1883.

No. 175--LAW.

ISAAC N. JENNESS,
Plaintiff in Error,
vs.
THE CITIZENS NATIONAL BANK OF ROMEO,
Defendant in Error.

Brief for Plaintiff in Error.

HARRISON GEER,
Attorney for Pl'tf in Error.

CLARION JOB PRINT, LAPEER, MICH.

(Indorsed:) U. S. circuit court, east. dist. Michigan. Isaac N. Jenness, impleaded with Allen Fish, plaintiff in error, vs. The Citizens' National Bank of Romeo, defendant in error. Assignment of error. E. W. Meddaugh, att'y for pl'tiff in error.

51 EASTERN DISTRICT OF MICHIGAN, ss:

I, Addison Mandell, clerk of the circuit court of the United States for the sixth circuit and eastern district of Michigan, do hereby certify the above and foregoing to be a true copy of the original record and proceedings in said court in the case of The Citizens' National Bank of Romeo against Isaac N. Jenness and Allen Fish (the same being the case of Isaac N. Jenness impleaded with Allen Fish, plaintiff in error, against The Citizens' National Bank of Romeo, defendant in error); that I have carefully compared the same with such original, and certify the same to be a correct transcript therefrom and of the whole of such original record and proceedings.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court of Detroit this 4th day of October, in the year 1880.

[SEAL.]

ADDISON MANDELL, *Clerk.*

Clerk's fees, $19.60; postage, 45—$20.05.

(Indorsement on cover:) No. 175. Isaac N. Jenness (impleaded with Allen Fish), plaintiff in error, vs. The Citizens' National Bank of Romeo. E. Michigan, C. C. U. S. Filed 23rd October, 1880.

110-52

SUPREME COURT U.S.
FILED
NOV 23 1883
JAMES H. MCKENNEY, CLERK

SUPREME COURT
OF
The United States.

OCTOBER TERM, 1883.

No. 175—LAW.

ISAAC N. JENNESS,
Plaintiff in Error,
vs.
THE CITIZENS NATIONAL BANK OF ROMEO,
Defendant in Error.

Brief for Plaintiff in Error.

HARRISON GEER,
Attorney for Pl'tf in Error.

CLARION JOB PRINT, LAPEER, MICH.

SUPREME COURT

OF THE UNITED STATES.

ISAAC N. JENNESS,
Plaintiff in Error,
vs.
THE CITIZENS NATIONAL BANK OF ROMEO,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern Dist. of Michigan.

STATEMENT OF CASE.

For several years prior to May 6th, 1876, the firm of A. & H. Fish, composed of Allen Fish and Henry Fish, carried on business at Port Huron, Michigan, and the firm of I. N. Jenness & Co., composed of Isaac N. Jenness, Allen Fish and Henry Fish, were engaged in business at Attica, Michigan.

Henry Fish died May 6th, 1876, and the surviving partners carried on the business for the purpose of closing it up, which was accomplished in November, 1877. November 25th, 1876, Allen Fish made a note for $2,000, payable to the order of I. N. Jenness, at the Citizens National Bank, of Romeo, ninety days from

date. Allen Fish signed this note, A. & H. Fish and I. N. Jenness indorsed it in person. (Record, page 15.)

This note was renewed by one dated Febuary 26th, 1877, for $2,000, payable to the order of I. N. Jenness & Co. It was signed A. & H. Fish, by Allen Fish; and indorsed I. N. Jenness & Co. by I. N Jenness. (Record, page 15.)

This note was renewed by one dated May 29th, 1877, for $2,000, payable to the order of I. N. Jenness & Co. It was signed A. & H. Fish by Allen Fish, and by him indorsed I. N. Jenness & Co. The renewals dated September 1st, 1877, and December 4th, 1877, were signed and indorsed in the same way by Allen Fish. These several notes are designated as the first series of notes in the bill of exceptions. (Record, page 15.)

March 10th, 1877, Allen Fish made a note for $2,000, payable to the order of I. N. Jenness, sixty days from date, at the American National Bank of Detroit. The note was signed A. & H. Fish, by Allen Fish and indorsed by I. N. Jenness and Thomas Skinner. This note was not protested when it fell due. (Record, page 21.)

May 21st, 1877, Allen Fish made a note for $2,000 payable to the order of I. N. Jenness & Co., three ~~weeks~~ months from date, at the Citizens Natonal Bank of Romeo. This note was signed A. & H. Fish by Allen Fish, and by him indorsed I. N. Jenness & Co., and he took up the note of the American National Bank of Detroit, with the avails of this note.

The renewals dated August 24th, 1877, and November 27th, 1877, were signed and indorsed in the same way by Allen Fish. These several notes are desig-

nated as the second series of notes in the bill of exceptions.

The question involved in this case is as to the liability of Mr. Jenness on the last note of each series.

Mr. Jenness filed, with his plea, an affidavit denying the execution of the notes by him as provided by rule 79 of the Circuit Court rules of Michigan, which said rule is as follows:

"Upon the plea of the general issue in an action upon any written instrument, under seal or without seal, the plaintiff shall not be put to the proof of the execution of the instrument or the handwriting of the defendant, unless the defendant or some one in his behalf shall file and serve a copy of an affidavit denying the same, and this rule shall apply in actions brought against endorsers as well as other parties, and shall also apply in favor of a defendant in cases where claims by way of set off are insisted upon by him. Such affidavit shall be filed when by the defendant with the plea, and when by the plaintiff within ten days after the service of the specific set-off claimed; but the Court may upon proper showing, enlarge the time for filing such affidavit."

ASSIGNMENT OF ERRORS.

First—The Court below erred in permitting the witness Allen Fish, to answer the following question, viz:

Q.—Do you remember for whom the money was raised and used, obtained from those notes—the first note and the renewal thereof, indorsed by Jenness in person?

Second—The Court below erred in instructing the jury as follows, viz:

"Mr. Jenness cannot be held upon that indorsement or upon any of the indorsements following that, and made in the same way, unless Mr. Fish had authority

from Mr. Jenness to make those indorsements, or unless his making those indorsements was subsequently ratified by Mr. Jenness."

Third—The Court erred in instructing the jury as follows:

"It is for you to say whether he had such authority, or whether such ratification was made."

Fourth—The Court below erred in instructing the jury as follows:

"The liability of Mr. Jenness upon that indorsement depends upon the same rule I have stated to you as prevailing in the other case, viz: Was Mr. Fish authorized to indorse the name of I. N. Jenness & Co., by Mr. Jenness, or was his action in so doing subsequently ratified by Mr. Jenness."

Fifth—The Court below erred in instructing the jury as follows, viz:

"Mr. Fish says that he was authorized to make the indorsements and to carry this paper along in the name of I. N. Jenness & Co, and use Mr. Jenness' name for that purpose."

Sixth—The Court below erred in instructing the jury as follows, viz:

"Accordingly as you find this authority or ratification, then the plaintiff or defendant is entitled to your verdict upon these notes."

Seventh—The Court erred in instructing the jury as follows, viz:

"It is not necessary that you should find absolute express authority in so many words to do it, but it may be implied from the circumstances of the case, and so may the ratification be implied from circumstances."

Eighth—The Court erred in instructing the jury as follows, viz:

"If you find that their method of doing business is such as to induce you to believe that Mr. Jenness did in fact expect Mr. Fish to indorse these notes in his name, or that he did authorize him to indose them in his name, or, that having indorsed them so, he ratified his action, the plaintiff is entitled to recover."

Ninth—The Court erred in not directing a verdict for the defendant Jenness, as requested by his counsel

Tenth—The Court erred in submitting to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness, or I.N.Jenness&.Co., in the renewal of the first series of notes, bearing date November 25th, 1876, which note was first renewed by Allen Fish September 1st, 1877, for the reason there was no evidence of authority shown, authorizing it.

Eleventh—The Court erred in submitting to the jury the question of au hority of Allen Fish to use the name of Isaac N. Jenness, or I. N. Jenness & Co., in the indorsement of the first note of the ~~several~~ series, bearing date May 21st, 1877, for the reason there was no evidence of authority shown, authorizing it.

Twelfth—The Court erred in submitting to the jury the question of authority of Allen Fish to use the name of Isaac N. Jenness, or the name of I. N. Jenness & Co., in each of the subsequent renewals of each of the series of notes, for the reason there was no evidence of au hority shown, authorizing it.

Thirteenth—The Court erred in submitting to the jury the question of ratification on the part of Jenness in the use of his name, or that of I. N. Jenness & Co., in the making or renewal of any of the notes in first series by Allen Fish.

Fourteenth—The Court erred in submitting to the jury the question of ratification on the part of I. N.

Jenness in the use of his name or that of I. N. Jenness & Co., in the making or renewal of any of the notes in the second series, by Allen Fish.

BRIEF.

The co-partnerships doing business as A. & H. Fish, and I. N. Jenness & Co, were dissolved by the death of Henry Fish, May 6th, 1876.

Parsons on Partnership pp 397 and 449.
Vilas vs. Farwell, 9 Wis., 460.
Marlette vs. Jackman, 3 Allen, 387.
Jenness vs. Carleton, 40 Mich., 343.
Dickinson vs. Dickinson, 25 Gratt, 321.

Allen Fish had, therefore, no authority to use the name of I. N. Jenness & Co. after that time, in indorsing the notes in question, by reason of the previous partnership relations, and if Jenness is to be held liable on these notes, it must be because he authorized Fish to use his name before the indorsements were made, or ratified the indorsements after they were made. The principal questions involved in the case then, are, did defendant I. N. Jenness, authorize Allen Fish to use the name of I. N. Jenness & Co. in indorsing the notes in question? If not, did he afterwards ratify it?

The Court instructed the jury with reference to each of the two series of notes, that Mr. Jenness would not be liable upon the indorsements made by Mr. Fish unless Mr. Fish had authority from Mr. Jenness to make the indorsements, or unless his making those indorsements was subsequently ratified by Mr. Jenness. Record, page 23. He thus submitted to the jury four questions of fact to be determined by them.

First, did Mr. Jenness authorize Mr. Fish to use the name of I. N. Jenness & Co. in indorsing the last note of the first series?

Second, if not, did he afterwards ratify it?

Third, did Mr. Jenness authorize Mr. Fish to use the name of I. N. Jenness & Co., in indorsing the last note of the second series?

Fourth, if not, did he afterwards ratify it?

If there is no evidence of Mr. Jenness having given Mr. Fish authority to indorse both those notes, or if there is no evidence of Mr. Jenness having ratified the indorsements, the judgment should be reversed.

An instruction that the jury shall find in a particular way, if they find certain specified facts, is erroneous, if there is a want of evidence of the existence of any material part of such specified facts.

Alexander vs. McSterling, 71 Ill., 366.
Hewitt vs. Begole, 22 Mich., 479.
Joslyn vs. Bishop, 25 Mich., 397
Chadwick vs. Butler, 28 Mich., 349.
Bower vs. Edson, 47 Mich., 91.

Mr. Jenness swears positively, that he never authorized Mr. Fish directly or indirectly to use the name of I. N. Jenness & Co., in indorsing these notes, and that he never had any conversation with Mr. Fish with reference to their renewal. Record, page 21.

We must look then to the testimony of Mr. Fish for evidence of authority or ratification. With reference to the first series of notes he says:

"The first and second notes were signed by me and indorsed by Mr. Jenness in person. The next note and also the other two notes of this series are signed by me, and the indorsement of I. N. Jenness & Co. on the same is in my handwritting. Mr. Jenness knew they were

renewed. He never made any objection to me for my use of the name of I. N. Jenness & Co., on the renewal of them." Record, page 18.

On cross examination, after stating that Mr. Jenness indorsed the second note of the series in person, he says:

"When this note was renewed, I signed it and indorsed it I. N. Jenness & Co. I do not think I had any conversation with Jenness about its renewal. I had no conversation with Jenness with reference to indorsing them after I made this indorsement of I. N. Jenness & Co." Record, page 18.

On page 19 of the record, after stating that Jenness was in California when the third note was made, and that he returned before the fourth note was made, on being asked "why he did not send this note to Mr. Jenness for his indorsement," he said:

"Oh, it was more convient for me to indorse it, put the same indorsement on it that was on the last, that was all The same rule holds good in all the renewals after that—simply for convenience * * * * * * I have no distinct recollection now of ever having had any conversation with Mr Jenness at or subsequent to the time of my indorsing the name of I. N. Jennes & Co., on the back of those particular notes."

With reference to the second series of notes he says:

"The first note is dated March 10th, 1877, signed A. & H. Fish, made payable to the order of I N. Jenness, at the American National Bonk of Detroit, 60 days after date and was endorsed I. N. Jenness and Thomas Skinner. I signed the name A. & H. Fish to that note and the indorsement is in the handwriting of Mr. Jenness and Mr. Skinner. To take up that note I got a note discounted at the Citizens National Bank of Romeo and the money which I received on that note I paid on this note at the American National Bank. That note discounted at the Citizens National Bank of Romeo was signed A. & H. Fish, dated May 21, '77

for $2,000 payable three months after date ; that was indorsed I. N. Jenness & Co., in my own handwriting. The other renewals were made and indorsed by me in the same way. At the time the note given to the American National Bank became due, Mr. Jenness was away from home in California. Before Jenness went away from home I had a conversation with him about taking up this note at the American National Bank. My recollection is there was a note filled out and signed A. & H. Fish, but the place of payment was left blank, indorsed by Mr Jenness. I came to Detroit but the American National Bank did not wish to renew * * I then made a note payable to the Romeo Bank as you see there, making the indorsement I. N. Jenness & Co. myself and they furnished the money and I took it and paid the note at the American National Bank. While this note was running and after Jenness got back from California I told him all the facts. He made no objection. The renewal notes were made in the same way by my signature." Record, page 20.

On the cross-examination he says:

"I cannot tell where or when I had the talk with Jenness about this note, it was after he came back from California, I think in June 1877. I have no specific remembrance of any talk about this series of renewal notes except the first one. The first I remember because of this peculiarity. Remember nothing in particular as to the others."

This is all the testimony given on the trial of this case bearing on the question of Fish's authority or Jenness' ratification.

Is there any evidence of authority given by Jenness to Fish to use his name in indorsing both these notes, and is there any evidence of ratification of the indorsement of both notes?

I.

IS THERE ANY EVIDENCE THAT MR. FISH HAD AUTHORITY FROM MR. JENNESS TO USE THE NAME OF I. N. JENNESS & CO. IN INDORSING THESE NOTES?

In considering this branch of the case, we are at a loss what to say. We are not able to conjecture upon what the learned counsel for the plaintiff base their right to recover on the theory that Fish had authority to use the name of I. N. Jenness & Co., in indorseing the notes. As we read the testimony there is nothing that could give rise to even a reasonable suspicion that Fish had this authority. With reference to the first series of notes it amounts to smply this, it was understood these specific notes were to be renewed. Mr. Fish does not claim that it was understood that he might use the name of I. N. Jenness & Co. in renewing the notes.

The record is silent as to the way in which the notes were to be renewed. It must certainly be accepted as a fact that at the outset Fish did not pretend to have authority to indorse the notes in the name of I. N. Jenness & Co., for he signed the first note of the series and sent it to Jenness for his personal indorsement. When it became necessary to renew this note the renewal note was signed by Fish and sent to Jenness for his personal indorsement. Suppose Jenness did understand that this note was to be renewed, it certainly will not be seriously urged that this gave Fish authority to use the name of I. N. Jenness & Co. in effecting the renewal.

If any inference is to be drawn from these circumstances, it must be that the notes were to be renewed as the former ones were, viz: By Jenness indorsing *t*hem in person.

Put the case stronger for the plaintiff than the record will warrant. Say that Jenness and Fish talked the matter over and that Jenness agreed to indorse for Fish to renew the second note, when it became due. If Fish could not then pay it, will counsel for plaintiff claim that this gave Fish authority to use Jenness' name in indorsing the note. Unless this is true there is not a particle of evidence tending to show that Fish had any authority to use Jenness' name, and the refusal of the Court to so instruct the jury was error.

Mr. Fish does not pretend that he had any more authority to use Jenness' name in indorsing the third note of this series than he had to use it to indorse the first, but simply says that he quit sending the notes over to Jenness for his indorsement, and indorsed them himself as a matter of convenience. Record, p. 19.

The first note of the second series was indorsed by Jenness & Skinner, but this note was not held by plaintiff. Before this note became due Jenness went to California, and Fish claims that he had some conversation with Mr. Jenness before he went away about renewing the note, and that Jenness gave him a blank indorsement for the purpose of effecting the renewal at the American National Bank of Detroit, where the note was held. This Bank declined to renew the note and Mr. Fish, without consulting Jenness, made a note payable at the plaintiff's bank and indorsed it himself, I. N. Jenness & Co. With the proceeds of this note he paid the note at the American National Bank. It will thus be seen that Mr. Jenness did not indorse any of the notes of the second series that were held by the plaintiff.

Now, if Fish had authority to use the name of I. N. Jenness & Co., why did he get the indorsement of

Jenness before he went away? And if he did not have authority to use the name of Jenness at this time, in what way between the time when Jenness gave him the blank indorsement, and the time when he made the note which is the first of the second series held by plainttff and indorsed it himself, did Jenness give him authority? His testimony does not show that he had any correspondence with Jenness either directly or indirectly between these dates, and we submit that he had no authority unless it be ture as a matter of law, that Jenness, by giving him a blank indorsement to be used at one bank for a particular purpose, gave him a general authority to use his name in indorsing notes. In attempting to maintain such a proposition as that, one would stultify himself, and we insist that as to the second series of notes there is no evidence that Fish had any authority to use the name of I. N. Jenness & Co., and the Court should so have instructed the jury. Record, page 20.

When the notes that were indorsed by Jenness in person were not protested, the legal presumption, so far as Jenness was concerned, would be that Fish had either paid the notes or had provided for their payment in some way where Jenness' rights were not involved. If this were not true the indorser would always be at the mercy of the one for whom he indorses. If plaintiff's theory is correct so far as this branch of the case is concerned, it must follow as a legal conclusion that one by indorsing a note gives the one for whom he indorses authority to use his name to indorse a note given to renew this one. The absurdity of such a proposition cannot be concealed.

We are confident that plaintiff's counsel must ail in their effort to convince this Court that Fish had author-

ity to indorse these notes as he did; that there is no evidence in the record from which the jury could be warranted in finding that he had authority, and it was error for the Court to submit the case to the jury to find whether he had adthority to use the name of I. N. Jenness & Co., in indorsing the notes.

A charge to the jury based upon a hypothesis which is not supported by any evidence is erroneous. See cases cited on page 7 of the brief.

II.

DOES THE RECORD CONTAIN ANY EVIDENCE OF RATIFICATION?

This question should be considered in the light of the following well established principle of law, viz: To make a ratification of the unauthorized acts of another binding on the principal, the latter must be fully and fairly informed of all the material facts and circumstances connected with the matter he is supposed to ratify, and also the effect his acts may have upon his rights.

Parsons on Contracts, vol. I, p. 52.
Elliot vs. Dudley, 19 Barb., 326.
Hisk vs. Smith, 8 Barb., 570.
Mathews vs. Hamilton, 23 Ill., 416.
Fletcher vs. Dysart, 9 B. Mon., 413.

The evidence of ratification should be as clear as that required for authority.

Wisconsin Bank vs. Morley, 19 Wis., 62.

So far as the question of ratification can claim any part in this case, it must have been a ratification between Jenness and the plaintiff. If Jenness was not liable on the notes first indorsed I. N. Jenness & Co., by Fish, because he had no authority to use Jenness'

name, then Fish alone was liable, and anything Jenness may have done with reference to ratifying this act of Fish would not create any liability as between plaintiff and Jenness, unless this act which was claimed to amount to a ratification was done directly with the plaintiff, or, if done with some one else, it must have been communicated to plaintiff and plaintiff must have relied upon it, and in so doing been prejudiced so far as its rights against Fish were concerned, Fish not having been authorized to make the indorsements, the act or acts on which the plaintiff relies to establish the ratification of what Fish had done in Jenness' name must be something by which the plaintiff, upon placing reliance, has been prejudiced.

Doughaday vs. Crowell, 3 Stockton, N. J. 201.

Fish had indorsed these notes without authority from Jenness, and the plaintiff had loaned him the money. Suppose Jenness had subsequently said to him that it was all right, that he considered himself bound by the indorsement, this certainly would not amount to a ratification so as to give plaintiff any right of action against Jenness, unless this fact had been communicated to the plaintiff and plaintiff had in some way relied upon it and been prejudiced by it.

In the case just put, it might give Fish a right of action against Jenness under certain circumstances, but plaintiff having loaned money to Fish, supposing that he had authority to use the name of Jenness in indorsing the notes, and relying on that supposition and not on any question of ratification, it cannot now claim to have a right of action against Jenness by reason of anything Jenness may have done, which it claims amounts to a ratification, without first showing that this act was brought to its knowledge and acted upon by it.

There is no pretense that the evidence in this case shows any such thing. Fish does not testify that any of the acts done by Jenness, which are claimed amount to a ratification, were ever communicated to the Bank and the bank does not claim to have known anything about them or to have acted on them in any way. There is no evidence that the bank had any conversation with Jenness with reference to these indorsements, and they evidently relied upon the supposed authority of Fish to make the indorsements as he did.

Mr. Smith testifies (record page 17) that in a conversation he had with Jenness on the cars, he requested Mr. Jenness to take case of this four thousand dollars in dispute, but that Jenness refused to do so, telling him that this was the paper of A. & H. Fish. Smith also testifies that this was all the conversation he had with Jenness with reference to this paper, and there is no evidence tending to show that any other officer of the bank ever had any conversation with Jenness about it.

Read, the cashier of the bank, testified (record page 17) that the first knowledge he had that there was any question about the authority of Fish to use the name of I. N. Jenness & Co. was after the last note had been negotiated. The bank certainly lost no right against Fish by reason of any supposed ratification by Mr. Jenness, for as soon as these notes became due, suit was begun upon them in Lapeer Circuit Court, which suit was discontinued and the present suit begun in the United States Court. There was, therefore, no evidence of any ratification directly with the bank which influenced their action in the least, and as before stated, we believe this to be the only kind of ratification that could aid the plaintiff in any way in this action against Jenness.

But if the Court should hold against us on this proposition, still we claim there was no evidence of any ratification that should have been submitted to the jury. There is no evidence of any express ratification. The only thing which plaintiff claims was a ratification, so far as we know, is that Jenness made no objection when Fish told him he had indorsed the notes. Mr. Fish says, record page 18, "Mr. Jenness knew they were renewed. He never made any objection to me for my use of the name of I. N. Jenness & Co., on the renewal of them." It will be observed that Fish does not swear that he told Jenness that he used the name of I. N. Jenness & Co., in indorsing the notes, but if he had Mr. Jenness' silence under the circumstances would not amount to a ratification as we shall show later.

The facts in this case are just the same as those in Carleton vs. Jenness, 40 Mich., 343, with the exception that in the Carleton case there was a claim made that Jenness had acknowledged his liability to Carleton directly, and in that particular Carleton had a stronger case against Jenness than the plaitiff in this case has. The acts of Jenness, which Carleton claimed amounted to ratification, were the same as plaintiff's counsel rely on here.

The Supreme Court of Michigan speaking through Mr. Justice Graves in that case, 40 Mich., page 346, says:

"The law is settled that it was not competent for Allen Fish, after the death of the co-partner Henry Fish, to bind Jenness by new contracts on the strength of any right or authority derived from the former relation of co-partnership. After the death of a member, one partner cannot renew a parnership note nor even accept a bill previously drawn on the firm so as to bind any one but himself.

3 Kent's Com., 63 *et seq.*
1 Parson's Cont., 201 *et seq.*

Therefore the notes were not binding on the plaintiff in error, unless he in some way authorized Allen Fish to subscribe it, or by some means thereafter ratified the act.

The import of the declaration and the main evidence given to support it is that the action is founded on the claim that Jenness' liability depended on his having been a member of the firm of I. N. Jenness & Co., and not upon any new and distinct relation. But passing this now we observe that there was no evidence conducing to make out any conduct by Jenness to imply in Carleton's favor that Jenness had engaged in partnership relations with Allen Fish after the death of Henry Fish, and as just intimated the declaration itself is not in harmony with any theory of liability springing from any relation of that kind. It describes both Jenness and Allen Fish as survivors of the firm of I. N. Jenness & Co., and necessarily conveys the statement that the liability imparted to Jenness was one which attached to him as a member of a firm composed of more persons than himself and Allen Fish, and is inconsistent with the notion of any liability as member of a firm composed of himself and Allen Fish alone.

In any event the separate acts of Allen Fish could not affect Jenness and subject him to liability as one holding himself out as one of a new firm composed of himself and Allen Fish. There was no evidence tending to prove that Allen Fish was authorized to use Jenness' name, either singly or as one of the firm, and after careful consideration we are satisfied that there was no evidence fairly tending to make out any ratification."

When the case was tried again Carleton introduced substantially the same testimony that the plaintiff in this case has. Mr. Jenness did not offer any evidence. The Circuit Judge directed a verdict in favor of defendant Jenness, and the Supreme Court affirmed the judgment.

Carlton vs. Jenness 42 Mich. 110,

Justice Cooley rendering the opinion, says:

"This case was before the Court at the January term and is reported in in 40 Mich., 343. It has again been tried and under instructions from the Court the jury have returned a verdict for the defendant Jenness.

The action is brought upon a promisory note dated June 30, 1877, made by the co-partnership of A. & H. Fish and proporting to be indorsed by the firm of I. N. Jenness & Co. There had been a co-partnership doing business under the name of I. N. Jenness & Co., which was composed of Jenness and Allen and Henry Fish, but it had been dissolved by the death of Henry Fish in May 1876. The note in suit was made more than a year later and was indorsed with the name of I. N. Jenness & Co., by Allen Fish without the knowledge or consent of Jenness. The question in contest in this suit was whether Jenness had subsequently ratified or sanctioned the indorsement Of this we find no evidence He refused to recognize it and denied liability upon it when it was first brought to his attention and continuously.

Much testimony was taken to show that Jenness had recognized the indebtedness for which the note was given as indebtedness of the firm of I. N. Jenness & Co., or at lesst as indebtedness for which he was morally or legally responsible. This evidence might have strengthened any proofs of his consent to or aquiesence in the giving of the note, if there had been any such proofs, but in the absence of any it is immaterial for what the note was given. Admitting the debt to have been a partnership debt of I. N. Jenness & Co., Fish nevertheless had no power to give the note and the note being the sole cause of action, the plaintiff could not recover, without establishing a right of action upon it. We agree with the Circuit Judge that no evidence was given tending to establish the liability of Jenness upon the note, and consequently nothing to submit to the jury.

The judgement must be affirmed with costs."

It will be borne in mind that there is no claim made by plaintiff that there was an express ratification. The most that can be claimed is that Jenness did not expressly repudiate the act of Fish when his attention was called to it. This, under the circumstances, would not amount to a ratification. When the relation of principal and agent does not in fact exist, there can be no implied ratification from mere silence. Fish was not Jenness' agent for any purpose. The agency growing out of the partnership relations terminated with the dissolution of the partnership.

In Ferry vs. Taylor, 33 Mo., 324, Ferry sought to recover from Taylor on a note to which one Norris had signed Taylor's name without authority; Norris was not Taylor's agent. The 3rd and 6th instructions given at the instance of the plaintiff, were as follows:

"3rd.—Even though the name of the defendant John Taylor, may have been signed to the note by some other person, yet if the jury believe from the evidence that he authorized the signing of it, or ratified, or adopted it after it was signed, then the jury must find for plaintiff."

"6th.—It is not necessary to render a person liable on a note that he should have actually signed it with his own hand, but he may become bound by authorizing the signing or by ratifying or adopting it after it is signed by another, although such other person may not have had any previous authority, and although the signature may have been forged."

Bay Justice delivering the opinion of the Court, page 334, says:

"We are of the opinion however, that error was committed in giving the third and sixth instructions asked by plaintiff.

The doctrine of ratification has no application to a case of this kind, for, when invoked here, it presupposes the existence of an agency—that Norris was the agent

of Taylor—that as such agent he committed in the name of his principal an unauthorized act which was subsequently ratified by the principal, and by virtue of which ratification the act became the act of the principal. Now, in this case, there is no evidence tending to show that Norris was the agent of Taylor for any purpose whatever, or had ever acted as his agent in any transaction whatever. The third and sixth instructions, therefore, tended to mislead the jury and should not have been given.

If the jury had found for the plaintiff on the theory that the defendant executed the note or authorized any person to affix his name to it, then we should not disturb the verdict, for the evidence would have warranted such a finding; but if it was upon the theory that the note was a forgery and that the defendant ratified or adopted it to shield Norris from the consequences of the act, the finding was erroneous. We, of course, cannot say which theory was adopted by the jury, and as it is possible that they may have been misled by plaintiff's third and sixth instructions, the judgement will be reversed and the cause will be removed. The other Judges concur."

In Ward vs. Williams, 26 Ill. 451 Caton C. J., says "The counsel in their arguments agree upon the correct principle of law as to the ratification of unauthorized acts done by one in the name of another. In general, when an agent is authorized to do an act and he transcends his authority, it is the duty of the principal to repudiate the act so soon as he is fully informed of what has been thus done in his name, by the agent, else he will be bound by the act as having ratified it by implication, but when a stranger in the name of another does an unauthorized act, the latter need take no notice of it although informed of the act thus done in his name, and he shall only be bound by an affirmative ratification."

In further illustration of this principle we cite Doughady vs. Crowell 3 Stockton, N. J., page 203, where the chancellor says:

"Nor is there any such proof of a ratification, on the

part of the defendant, of the sale by Shotwell as to warrant a decree for specific performance. The complainant took possession under the deed he had received from the other heirs. When the defendant returned from the west he found the complainant in possession of the land. The only evidence relied upon as a ratification, by the defendant, of the sale is that when he was told the terms of the sale for the first time, he did not promptly express his disapprobation of them, but said he did not want his money then, and should not want it until he returned west. But he did not give a deed, and subsequently he refused positively to give a deed and expressed his disapprobation of the terms upon which the land was sold. Shotwell, not having been authorized to act as the agent of the defendants, the act or acts upon which the complainant relies to establish the ratification of what Shotwell had done in the defendant's name must be something by which the complainant, upon placing reliance has been prejudiced.

The complainant did not enter into possession in consequence of anything said or done by the defendant. She relied upon Shotwell, who was acting without any authority. The improvements were put upon the land after the defendant had refused to execute a deed; and if they were not, the mere fact that the defendant did not make any formal objection to the terms of the sale and said he did not want the money until he returned west, did not justify the complainant in assuming a right to the title of the defendant's interest in the land."

White vs. Langdon, 30 Vt., 600, was trover for a horse belonging to White, which one McLaren without authority, had sold to Langdon. The defence was that Langdon had ratified the sale. The only evidence of ratfication was that he did not repudiate the sale when his attention was called to it.

Aldis, J., rendering the opinion, says:

"The report of the referee states that the plaintiff knew of the sale from McLaren to the defendant in January; knew that the defendant was at the depot in

Wells River, (the residence of the plaintiff,) nearly every day during the winter, and gave the defendant no notice of his lien on the horse till April; the defendant claims that the plaintiff, by such ommission to give notice and make claim, has thereby ratified the sale of McLaren. We think not; it would be reversing the rule of law. It is the duty of one trading with an agent who has only a limited and special authority, to make inquiry as to the extent of the agent's authority. If he omits inquiring he does it at his peril; it is not the duty of the principal upon hearing of the sale by the agent, to seek the purchaser and give him notice of his claim, and his ommission to do so, and his mere silence are not ordinarialy to be construed as a ratification of the sale."

The form of the note indicated that the money was borrowed for the use and benefit of A. & H. Fish. At the cutset the officers of the bank knew that Jenness indorsed this paper in person, and when they saw that a change was made and the paper was made and indorsed by Fish, they should have asked for an explanation, why the change was made and whether he had authority to indorse these notes in that way. This was of itself sufficient to put them on their guard, and having neglected to ascertain from Jenness whether Fish had authority to make the indorsements as he did, they take the notes subject to any legal defense that Jenness had at the time they were executed.

There is another important fact to which we desire to call the attention of the Court, and that is, with reference to the admission of the evidence as to where the money was used borrowed from the plaintiff. It seems to us the Court erred in permitting the witness Fish to answer where he used the money which he borrowed from the plaintiff. It had a tendency to mislead the jury and was prejudicial to the rights of Jenness.

When Fish replied that the money was used for the

business that was being carried on by I. N. Jenness & Co., this Court will readily see, that the jury must have concluded that if I. N. Jenness & Co. had the benefit of the money borrowed, that Jenness ought to be liable for it.

It seems to us after a careful examination and study of this record, that the verdict of the jury can not be accounted for on any other possible theory, except that Jenness was liable because Fish stated he used the money in the business of I. N. Jenness & Co. This must have been the controlling element, and evidently the one upon which the jury acted in arriving at their verdict.

This evidence was incompetent even upon the theory that there was a partnership existing, and much more so in view of the facts of this case.

If a partner who has given his own note for money borrowed by himself, apply that money to partnership purposes, this does not make it a partnership debt. The partnership owes the borrowing partner and he owes the lender.

Parsons on Contracts, vol. 1, p. 180.
Emily vs. Lye, 15 East, p. 6.
Graff vs. Hitchman, 5 Watts, p. 454.
King vs. Faber, 22 Penn. St., p. 21.
Peterson vs. Roach, 32 Ohio St., p. 374.
National Bank of Salem vs. Thomas, 47 N. Y., p. 15.
Norwalk Bank vs Sawyer, Reporter, vol. 14, p. 601.

We submit the first assignment of error is well taken.

The dissolution of a partnership, however caused, makes the partners distinct persons. All authority by virtue of the partnership relation is at an end.

After the death of Henry Fish, Allen Fish had no

authority to bind defendant Jenness by indorsing the note with the firm name of I. N. Jenness & Co., even though the note may have been given in renewal of one on which the firm of I. N. Jenness & Co. was liable, without special authority; and a general authority to settle the business of the firm would not give such power.

Long vs. Story, 10 Mo., 637.
Bank vs. Norton, 1 Hill, 572.
Palmer vs. Dodge, 4 Ohio St., 21.
Parsons on Bills and Notes, Vol. I, p. 146.
Parker vs. Cousins, 2 Gratt., 372.
Martin vs. Kirk, 2 Humph. 529.
Bank vs. Humph, 1 McCord, 388.
Smith vs. Sheldon, 35 Mich., 42.
White vs. Tudor, 24 Tex., 641.
Lange vs Kennedy, 20 Wis., 279.
Story on Partnership, sections 322–328.
Vanvalkenburg vs. Bradley, 14 Iowa, 108.
Dickerman vs. Bowman, 14 Wis., 388.
Montague vs. Rickett, 6 Bush Ky., 393.
Lumberman's Bank vs. Pratt, 51 Me., 563.
Moore vs. Lackman, 52 Mo., 323
Merritt vs. Pollys, 16 B. Mon., 355.
Carleton vs. ~~Fish~~ Jenness, 40 Mich., 343.

We also call the attention of the Court to that portion of the Judge's charge which is as follows:

"Mr. Fish says he was authorized to make the indorsements, and to carry this paper along in the name of I. N. Jenness & Co., and use Mr. Jenness' name for that purpose."

The record shows that substantially all the evidence given on the trial of said cause is embraced in it, record page 21.

Upon an examination of the testimony of Allen Fish as contained in this record, this Court will find that Allen Fish gave no such testimony, and he gave no

testimony from which any such conclusion can properly be drawn.

This portion of the Judge's charge had a tendency to mislead the jury, and was prejudicial to the rights of Jenness, and we submit the 5th assignment of errer is well taken.

The district Judge in his charge to the jury used this language.

"If you find that their method of doing business is such as to induce you to believe that Mr. Jenness did in fact expect Mr. Fish to indorse these notes in his name * * * * the plaintiff is entitled to recover."

This should have not been given for the following reasons: There is no evidence from which the jury could have found that Jenness expected any such thing. The evidence shows conclusively that prior to the time when Jenness went to California, he indorsed the notes in person. This was *their method of doing business* while Jenness had anything to do with it. But conceding for the purpose of this argument that Jenness did expect Fish to indorse these notes, that Fish and Jenness supposed that Fish had authority to indorse them by reason of their former partnership relations, that neither of them knew that the death of Henry Fish terminated that authority. Still, if as a matter of law, the death of Henry Fish had that effect, Fish had no power to bind Jenness by the indorsement, and Jenness would not be liable.

We insist in conclusion that there was no evidence given on the trial of this cause tending to show that Fish had authority to indorse these notes as he did, or that Jenness ratified the indorsement. The Court instructed the jury that they might find for the plaintiff on

the grounds of original authority or subsequent ratification. If there was a total want of evidence on which to base either hypothesis, the judgement can not be sustained. We do not know which they adopted in arriving at their verdict against Jenness. If the charge of the court in either branch of the case therefore was erroneous or misleading, a new trial should be granted.

HARRISON GEER,
Attorney for Plaintiff in Error.

110-52

SUPREME COURT

— OF —

The United States.

OCTOBER TERM, 1883.

No. 175.

ISAAC N. JENNESS,
Plaintiff in Error,
vs.
THE CITIZENS' NATIONAL BANK OF ROMEO.
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Michigan.

Brief for Defendant in Error.

HARRISON GEER,
Attorney for Plaintiff in Error.

HENRY M. DUFFIELD,
Counsel for Defendant in Error.

DETROIT:
JOHN F. EBY & CO., BOOK AND JOB PRINTERS.
1883

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 175.

ISAAC N. JENNESS, *Plaintiff in Error,* vs. THE CITIZENS' NATIONAL BANK, OF ROMEO, MICHIGAN, *Defendant in Error.*	*Error to the Circuit Court of the United States for the Eastern District of Michigan.*

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Isaac N. Jenness, the plaintiff in error, and one Allen Fish were sued upon several promissory notes. They were surviving partners of the firm of I. N. Jenness & Co., originally composed of Isaac N. Jenness and Allen and Henry Fish. Allen and Henry Fish also composed the firm of A. & H. Fish. The firm of I. N. Jenness & Co. was engaged in business at Attica, Michigan. Their business was principally manufacturing lumber, and they sent their lumber to Port Huron, Michigan, to the firm of A. & H. Fish, which was

also engaged in the lumber business. Henry Fish died in May, 1876, but the use of the respective firm names and the making and endorsing of notes in the firm names was continued by Isaac N. Jenness and Allen Fish for about two years thereafter.

Testimony of I. N. Jenness, Record page 21, folio 43.

Certain of the notes sued upon were made by the plaintiff in error in the name of "I. N. Jenness & Co." to the order of "A. & H. Fish." His liability upon these notes was conceded.

In certain other notes "A. & H. Fish" were makers, and "I. N. Jenness & Co." were endorsers. The first of this series of notes was dated November 25th, 1876, for $2,000, payable ninety days from date, and endorsed by Isaac N. Jenness in person. The money raised on this note went into the business of I. N. Jenness & Co.

The second was a renewal of the first, dated February 26th 1877, endorsed "I. N. Jenness & Co." by Isaac N. Jenness in person. This fell due while Isaac N. Jenness was absent in California as hereinafter stated.

Testimony of I. N. Jenness, Record p. 21, folio 43.

The next three notes were renewals, dated respectively May 29th, 1877, September 1st, 1877, and December 4th, 1877. On each of the last three renewals the name of "I. N. Jenness & Co." was endorsed by Allen Fish.

Another series of notes was made in this way. A note for $2,000 dated March 5th, 1877, payable sixty days from date, made by A. & H. Fish to the order of, and endorsed by, Isaac N. Jenness in person, was held by the American National Bank of Detroit. Before this note fell due Jenness went to California, but he endorsed and left with Fish a note to be discontinued for the purpose of taking up the note dated March 10th, 1877.

In the note so left, the place of payment was left blank. The Merchants and Manufacturers' Bank of Detroit with which this note was intended to be discounted, refused to discount it because this blank was not filled in, when Jenness endorsed his name on it. Before this last note fell due Isaac N. Jenness went to California and was absent from early in May to the end of June, 1877.

The note at the American National Bank was duly protested May 12th, 1877. To take up this protested note, while Jenness was absent in California, Fish made a new note for two thousand dollars, dated May 12th, 1877, signed A. & H. Fish, payable three months after date to the order of I. N. Jenness & Co., and endorsed it "I. N. Jenness & Co."

This note was discounted by the defendant in error, and with the proceeds Fish took up the protested note at the American National Bank.

Record p. 20, folio 42.

The defendant in error twice renewed the note which it held, Fish giving it like notes in renewal, signed and endorsed by himself, dated respectively August 24th, 1877, and November 24th, 1877. Fish adjusted the interest at the times of renewal and the several amounts of each of the notes remained unchanged.

It is not claimed that the defendant in error had any notice of any irregularity in either of the notes it discounted. Plaintiff in error denied the authority of Fish to endorse the name of "I. N. Jenness & Co," or the name of "Isaac N. Jenness," on any of the notes.

He testified that he never authorized Fish to sign his name to the notes or to endorse the firm name of "I. N. Jenness & Co."

Record p. 21, folio 43.

On the other hand Fish testified that Jenness did know of it and both authorized it and approved it.

Record p. 18, folio 39.
Record p. 19, folio 40.

As to the note which was made while Jenness was in California, Fish testified that when Jenness returned *and before the note fell due* he informed Jenness of its renewal in the manner above stated, "*telling him all the facts,*" and he made no objection.

Record p. 20, fol. 42.

John Smith, Jr., the Vice President of the Defendant in error testified that in January, 1878, he had a conversation with Jenness about the $4,000.00 indebtedness under the two $2,000.00 notes; that in this conversation Jenness did not intimate that there was anything wrong about the notes or either of them.

Record p. 17, fol. 37.

The Circuit Court left to the jury under qualifications more favorable to the Plaintiff in error than he could rightfully claim the question of the authority from Jenness to Fish to endorse the disputed notes in the name of I. N. Jenness & Co.

ERRORS ASSIGNED.

Error is assigned on the admission of testimony showing that the money raised on the notes endorsed by Jenness in person went into the business of I. N. Jenness & Co.

Record p. 18, fol. 39.

And to the submission by the Court to the jury, of the question of the authority of Fish to make the disputed endorsements.

I.

It was entirely competent and relevant to show that the money obtained on the $2,000 of November 25th, 1876, went into and was expended for, the benefit of the business of I. N. Jenness & Co.

The tendency of this evidence was to prove that the note was accommodation paper made in name of A. & H. Fish, used for the benefit of Allen Fish and I. N. Jenness, who were continuing to do business under the firm name of I. N. Jenness & Co., notwithstanding the death of their partner Henry Fish.

It was competent and admissible to show the relations of the surviving partners as between themselves, and the mode in which they were continuing to do business.

Again, while it might not be competent or admissible evidence in a suit against an endorser as such to establish any other liability than that of his endorsement,

Newberry vs. Trowbridge, 13 Mich. R., p. 263,

it was competent and admissible here, in connection with Fish's testimony touching his authority to endorse the note in the name of "I. N. Jenness & Co."

The case of

Carleton vs. Jenness, 42 Mich. R., p. 110,

is a decision upon one of these same kind of notes. The court say on page 111:

"Much testimony was taken to show that Jenness had recognized the indebtedness for which the note was given as indebtedness of the firm of I. N. Jenness & Co., or at least as indebtedness for which he was either morally or legally responsible. This evidence might have strengthened any proofs of his consent to, or acquiescence in the giving of the note, if there had been such proof."

II.

In the case at bar there was evidence tending to show a business relation of partnership *between Jenness and Fish* in continuing the business of the late firm of I. N. Jenness & Co. under the old firm name.

The conceded facts were sufficient to establish a partnership as to third persons. The two survivors, plaintiff in error and Allen Fish, continued in fact to do business as before and under the old firm name, and thereby assumed the character of, and incurred the liability of a firm from the death of Henry Fish composed of the remaining members and bearing the old name.

Plaintiff in error himself testified: "Allen Fish *and I* continued the business under the old firm name for about two years to close up the business; *we made* notes for our business in the name of *I. N. Jenness & Co.*; *no one else was interested in that firm* except Allen Fish and myself."

Record page 21, folio 43.

Allen Fish testified: "After the death of Henry Fish the old business of I. N. Jenness & Co was carried on under the name of the old firm by Isaac N. Jenness and myself."

Record page 18, folio 38.

One of the very endorsements, the renewal of which he contests, was *made by himself* in the name of I. N. Jenness & Co.

Record page 14, folio 34.

While all the notes upon which he admits the liability of Allen Fish and himself are made by him in the name I. N. Jenness & Co.

Record page 14, folio 33.

Certainly this is such a holding out of himself to the world as a partner in the firm of I. N. Jenness & Co., that he is estopped to deny the relationship.

Lindley on Partnership (1 Ed), p. 51.
Matteson vs. Nathanson, 38 Mich. R., p. 377.

Catlin vs. Guilders, 3 Ala., p. 536, was a case of a promissory note made in the name of the firm between all

the partners after its dissolution. It was held that, although the death of one of the partners, *ipso facto*, dissolved the partnership of Catlin, Peoples & Co., yet it was competent for the survivors to invest each other, or any one of their number, with authority to borrow money and make notes upon their joint account in order to pay the debts of the firm. And it was permissible for the plaintiffs to show that the defendant recognized the authority of the other surviving partners thus to pledge his responsibility by proof of his admission or declarations to that effect."

In

Fellows vs. Wyman, 33 N. H. R. p. 351,

the court recognized the general doctrine that a partner has no authority to endorse notes in the firm name after dissolution, but say, "this general rule will not of course apply where a partner, after dissolution, has authority from the other partners to endorse in the name of the firm, and such authority may be implied from circumstances."

First National Bank vs. Freeman, 47 Mich. R., p. 408, although not a case of surviving partners, is in point. Freeman, Speer and Wetmore, "as co-partners under the firm name of Propeller Ira Chaffee," were sued upon a promissory note made payable to the order of Propeller Ira Chaffee, and endorsed "Propeller Ira Chaffee, F. B. Speer, Manager." Freeman defended, putting in a plea of the general issue with an affidavit, denying the execution of the instrument. There was evidence tending to show that the defendants were owners of the propeller and were engaged and interested in running the propeller, and shared the profits thereof in proportion to their interests.

The note in suit was given by the maker to renew a note originally given to the propeller in payment for freight and supplies which had been negotiated to carry on the running of the vessel. There was some evidence tending to show that the defendants were partners in the business of running the

vessel, but this was denied by some of the defendants. Held, there was evidence tending to show the business relation of partnership and the proper weight thereof was for the jury. The surviving members of a firm may continue the business in its name, after its dissolution by the death one of its members, and such survivors will be bound by contracts made in the course of such business.

Staats vs. Howlett, 4 Denio R., p. 559.

If one suffer another to hold him out as a partner, or to use his name in business as such, he is liable on a contract thus made, although in fact he has no interest in the business of such partnership.

Smith vs. Hill, 45 Vt. R., p. 90.
Buckingham vs. Burgess, 3 McL. R., p. 364, 549.

Plaintiff in error will doubtless rely on the cases of

Jenness vs. Carleton, 40 Mich. R., p. 343.
Jenness vs. First National Bank, Ib., 347.
Carleton vs. Jenness, 42 Mich. R., p. 110.

In the first of these cases, the action was against Isaac N. Jenness and Allen Fish, *as survivors of the firm of I. N. Jenness & Co.* The trial Court directed a verdict for the plaintiff. It clearly appears that the plaintiff was privy to the transaction, and knew at the time of taking the note, that Allen Fish wrote all the signatures. The note in question in that suit was given for the balance found due on the settlement between Allen Fish and the holder, whereby certain claims against the holder were applied on the first note, and it was held in accordance with the settled weight of authority that Allen Fish had no right to execute the note in the name of I. N. Jenness & Co. None of the facts which appear in the case at bar, showing the continuance by Isaac N. Jenness and Allen Fish, of the business of the old firm of I. N. Jenness & Co., and the making of the notes under that name, not only

by Allen Fish but also by Isaac N. Jenness, were given in evidence in that case.

Neither was there any testimony that Isaac N. Jenness had recognized his liability on notes made or endorsed after the death of Henry Fish, in the name of I. N. Jenness. The opinion of the Court expressly declares, page 346 * * *

" We observe that there was no evidence conducing to make out any conduct by Jenness to imply in Carleton's favor, that Jenness had engaged in partnership relations with Allen Fish after the death of Henry Fish, and, as just intimated, the declaration itself is not in harmony with any theory of liability springing from a relation of that kind.

It describes both Jenness and Allen Fish as survivors of the firm of I. N. Jenness & Co., and necessarily conveys the statement that the liability imputed to Jenness was one which attached to him, as a member of a firm composed of more persons than himself and Allen Fish, and is inconsistent with the notion of a liability as member of a firm composed of himself and Allen Fish alone."

In the second of these cases the trial court also directed a verdict in favor of the plaintiff. The report of the case does not state the testimony adduced on the trial. But so far as the decision has any bearing on this case, it is on the side of the defendant in error. The Court expressly held on page 348,

" Whether such authority was given in this case, or there was subsequent ratification by Isaac N. Jenness, in order to bind him, should have been submitted to the jury under proper instructions. We can imagine no possible theory which could justify the Court in directing the jury to render a verdict in favor of the plaintiff for the amount claimed."

The third of these cases was a writ of error taken out to review the second trial of the first case. The Court, in its opinion, find that the note was endorsed with the name of I. N. Jenness & Co., by Allen Fish, without the knowledge or consent of Jenness. They find no evidence that Jenness

had subsequently ratified or sanctioned the endorsement and that he refused to recognize it, and denied liability upon it when it was first brought to his attention and continuously.

III.

The Circuit Court submitted the case to the jury upon the narrower ground of simple agency. It left the question of the authority to Fish from Jenness to be determined by the jury from the testimony.

The only theory upon which this limitation of the plaintiff's right to recover can be attempted to be sustained in favor of plaintiff in error, is that although Fish and Jenness were partners under the firm name of I. N. Jenness & Co., the notes being in form made by A. & H. Fish, and endorsed in the firm name of I. N. Jenness & Co., the bank was chargeable with notice of Allen Fish's want of authority to use the firm name of I. N. Jenness & Co. Allen Fish testified that all the money raised on these notes was used in the business of I. N. Jenness & Co.

Record p. 18, folio 39.

The testimony of Allen Fish was direct and express that Mr. Jenness knew of the three renewals of the $2,000 note of November 25th, 1876, and never made any objection to him for his use of the name of I. M. Jenness & Co. on these renewals.

Record p. 18, folio 39.

Again, at the top of page 19, he testifies it was understood that these specific notes were to be renewed, that he and Jenness often talked them over; that every one of the notes that had to be renewed he had a talk with Jenness about: That every note, when these notes were coming due, we (they) talked it over; that before Jenness went to California they had a good deal of talk how they should manage the notes that they had out.

Record p. 19, folio 40.

As to the note dated May 21st, 1877, for $2,000 he testifies that while this note was running and after Jenness got back from California, he told him all the facts, and that Jenness made no objection.

Record p. 20, folio 42.

John Smith, Jr., vice-president, of the defendant in error, testifies as before mentioned that before the note for $2,000.00, dated December 4th, 1877, and the note for $2,000.00 dated November 27th, 1877, fell due, he had a conversation with the defendant in error, concerning his liability on these two notes and that Jenness made no objection to his liability.

Record page 17, folio 37.

There is no testimony tending to show any knowledge on the part of the Bank that the proceeds of the notes made in the name of A. & H. Fish were used except for the legitimate business of I. N. Jenness & Co. Therefore we think the case did not warrant this limitation of the right of the defendant in error to recover on the notes sued upon.

But upon the testimony it seems clear to us that the plaintiff in error has no ground of complaint against the instructions of the Court to the jury.

With reference to the three renewals of the note of November 25th, 1876, for $2,000, Allen Fish testified expressly that Mr. Jenness knew they were renewed, and never made any objection to him to the use of the name of I. N. Jenness & Co. on the renewals of them.

Record p. 18, folio 39.

In regard to the renewals of the note of March 10th, 1877, for $2,000, payable at the American National Bank, as already stated, Fish testifies that while the first renewal was running, and after Jenness got back from California, he told him all the facts, and Jenness made no objection.

As already stated, when asked by the president of the plaintiff in error to take up the $4,000 due on these two notes

and settle with the bank he replied, "you had better keep it. It is their paper, and for them to pay."

Record p. 17, folio 37.

In *Ward vs. Williams*, 26 Ill. R., p. 447, Ward had endorsed a note in blank for $3,000.00 and delivered it to one Lewis to raise money on it for Ward. It was changed by Lewis to the form of a bill of exchange drawn by himself to Ward's order on the Metropolitan Bank, New York. "When the bill was presented to him for payment by Williams he took it in his hands and examined it. Neither then or at any other time did he make any objections to the alterations which had been made in the paper, or deny that it was a genuine piece of paper as it then stood, but he claimed that Lewis was primarily liable to pay it and that Lewis had notified him not to pay it. He made no objections to it on his own account. He did not complain that it was not his endorsement or even that he was not liable on that endorsement for any cause." He did not pretend to know what objections Lewis had to the payment of the bill, and he had or pretended to have none himself. We repeat that while this was not an express ratification of the form which had been given to the paper by Lewis, it was a ratification by implication of the strongest possible character."

In the *Gold Mining Co. vs. National Bank*, 96 U. S. R., p. 640, the charge of the trial judge on the subject of ratification by the company was in substance that if Sabin was the agent of company without authority to borrow money in defendant's name, but did borrow large sums of the plaintiff in defendant's name, and the president of the company was informed of such borrowing and the amounts and a demand was made for the payment thereof, that if within a reasonable time thereafter the company failed to disavow the acts of its agent in so borrowing the money, the jury would be authorized to consider the company as assenting to what was done in its name. This

charge was held by this Honorable Court to be entirely correct.

See also,

Law vs. Cross, 1st Black R., p. 533.

In *Johnson vs. Jones*, 4 Barb. R., p. 369, it is held where a person is to be charged for the account of another alleged to be his agent, where there is evidence of an apparent authority in the agent to bind the principal, the question to be determined is, not what power was intended to be given to the agent, but what power a third person dealing with him had the right to infer from his own acts and those of his principal he possessed.

In *Richmond Manufacturing Co. vs. Starks*, 4 Mason R., p. 296, Mr. Justice Story held that a subsequent confirmation was equivalent to an original authority.

In *Bronson's Executor vs. Chappel*, 12 Wall. R., p. 681, Mr. Justice Swayne thus tersely states the doctrine here contended for:

"Where one without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it."

Again, in this country the law is settled that even a forged endorsement may be ratified.

In *Stroh vs. Hinchman*, 37 Mich. R., p. 490, one Winsor endorsed the defendant's name in imitation of his genuine signature. It was held: "That while it was not admissible to